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IN THE SUPREME COURT OF THE
UNITED STATES OFFICE OF THE CLERK

OCTOBER TERM, 1995

STATE OF ALABAMA,

PETITIONER,

v.

JAMES WILLIE COCHRAN,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is certiorari review by this Court merited where the Court of Appeals ignored the precedent of this Court and its own precedent in holding that a claim found by the State courts to be procedurally barred could be reviewed on the merits in Cochran's federal habeas corpus proceeding because the State courts did not consistently apply its procedural bar?

PARTIES

The caption contains the names of all the parties.

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OPINIONS BELOW

Petitioner/Appellee/Cross-Appellant James Willie Cochran ("Cochran") was convicted and sentenced to death in Jefferson County, Alabama, for the capital offense of robbery when the victim is intentionally killed. Ala. Code §13A-5-31(a)(2) (1975). The state court trial and direct appeal proceedings have been accurately summarized by the Alabama Court of Criminal Appeals as follows:

> In August of 1977, Cochran was originally tried for a capital offense involving the murder of Stephen Jerome Ganey. The trial ended in a mistrial granted pursuant to Cochran's motion ... In January of 1978, Cochran was tried a second time for a capital offense. His conviction was reversed on appeal on authority of Beck v. State, 396 So.2d 645 (Ala. 1980) ... In March of 1982, Cochran was tried a third time and convicted.

Cochran v. State, 500 So.2d 1161, 1165 (Ala.Crim.App. 1984).

> That conviction and sentence were ultimately affirmed on appeal.

> Cochran v. State, 500 So.2d 1161 (Ala.Crim.App. 1984), affirmed in part, reversed in part, and remanded Ex parte Cochran, 500 So.2d 1188 (Ala.Crim.App. 1986), affirmed, Ex parte Cochran, 500 So.2d 1064 (Ala. 1986), cert. denied, Cochran v. Alabama, 481 U.S. 1033 (1987).

Cochran v. State, 548 So.2d 1062, 1063 (Ala.Crim.App. 1989).

On June 12, 1987, Cochran filed a collateral petition for relief from conviction or sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. An evidentiary hearing was held on February 16, 1988, and in an order in the nature of an opinion, entered on April 8, 1988, the state collateral court denied Cochran's petition. The Alabama Court of Criminal Appeals affirmed the denial of relief on appeal. Cochran v. State, 548 So.2 1062 (Ala.Crim.App. 1989), cert. denied, 548 So.2d 1062 (Ala.), cert. denied, 493 U.S. 900 (1989).

On June 21, 1990, Cochran filed a habeas corpus petition in the United States District Court for the Northern District of Alabama. On August 30, 1990, the State of Alabama[1] filed an answer and on September 25, 1990, filed an amended answer. Following discovery, an evidentiary hearing was held on July 15, 1991, and October 15, 1991.

In an order entered on June 8, 1993, the federal district court granted Cochran conditional relief by ordering a new sentencing hearing. (This order can be found in the appendix to this petition.) The federal district court concluded that

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[1]Respondent/appellant/cross-appellee Tommy Herring is a party only because of his custodial status over Cochran. Therefore, in this petition for writ of certiorari, references will be to the State of Alabama, which is the real party in interest, instead of to Herring.

the performance of Cochran's counsel in failing to conduct a background investigation prior to the penalty phase of the case in 1982 was constitutionally deficient. The federal district court held that all other claims were either defaulted or without merit.

On June 15, 1993, the State of Alabama filed a motion to alter the judgment which the federal district court denied on July 22, 1993. On June 22, 1993, Cochran filed a motion for reconsideration, and to alter judgment, or to amend judgment which the federal district court granted on July 22, 1993. In that July 22, 1993, order, the federal district court ordered an evidentiary hearing be held so that Cochran could present evidence on the Batson claim. (This order can be found in the appendix to this petition.) On November 22, 1993, an evidentiary hearing was held on the Batson claim. (This order can be

found in the appendix to this petition.) On November 24, 1993, the federal district court granted Cochran relief on the Batson claim. On December 3, 1993, the State of Alabama filed a notice of appeal and a motion to stay the judgment pending this appeal. That motion was granted on December 7, 1993. On December 17, 1993, Cochran filed a notice of appeal and a motion for certificate of probable cause. That motion was granted on December 20, 1993.

After briefing and hearing oral argument from the parties; the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") affirmed the district court's grant of relief on the Batson claim. Cochran v. Herring, 43 F.3d 1404 (11th Cir. 1995). The Court of Appeals did not address any other issue because it granted relief on the Batson claim. On January 30, 1994, the State of Alabama filed a petition

for rehearing. On July 26, 1995, the Court of Appeals, in response to the State of Alabama's petition for rehearing, modified its opinion by deleting a citation from its panel opinion. (This opinion can be found in the appendix to this petition.) The State of Alabama's petition for rehearing was otherwise denied. On August 22, 1995, the Court of Appeals, pursuant to a motion made by the State of Alabama, stayed the issuance of the mandate to and including October 24, 1995.

GROUNDS OF SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction to review the decision of the Court of Appeals dated January 10, 1995, and from the Court of Appeals' decision denying the State of Alabama's petition for rehearing dated July 26, 1995, by writ of certiorari based on 28 U.S.C. §1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

PRECLUSION OF GROUNDS. A petitioner will not be given relief under this rule based upon any ground: (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b). Rule 32.2(a)(5), Alabama Rules of Criminal Procedure.

INTRODUCTION

The State of Alabama respectfully requests that a writ of certiorari issue to review the decision of the Court of Appeals granting Cochran's Batson[2] claim for post-conviction relief.

The Court of Appeals ruled that, in cases such as Cochran's,[3] the Alabama courts "have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain [v. Alabama, 380 U.S. 202 (1965)] objection at trial." Cochran v. Herring, 43 F.3d at 1409. However, the Court of Appeals only

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[2]Batson v. Kentucky, 476 U.S. 79 (1986).

[3]Cases in the same procedural context as Cochran's were tried before Batson was decided in April 1986, but were pending on direct appeal when Batson was decided. Under Griffith v. Kentucky, 479 U.S. 314 (1987), Batson applies retroactively to such cases.

identified one case, Ex parte Floyd, 571 So.2d 1234, 1235-36 (Ala. 1990), where an Alabama state appellate court allowed a state collateral petitioner to raise a Batson claim despite the claim being in procedural default.[4] One aberrant decision by a state court ignoring a state procedural rule is not sufficient to apply the sporadic application of the state procedural rule which would allow a federal court to review the merits of a procedurally defaulted claim.

The State of Alabama believes that the Court of Appeals' decision in this case is in direct conflict with a decision of this Court. In Dugger v. Adams, 489 U.S. 401,

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[4]In Floyd, the petitioner had not raised the Batson claim on direct appeal. Rule 32.2(a)(5) of the Alabama Rules of Criminal Procedure states that a claim is procedurally defaulted if it could have been but was not raised on direct appeal.

410 n. 6 (1989), this Court indicated that when state courts have followed a procedural rule "faithfully" in "the vast majority of cases," and have deviated from the procedural bar in only a "few cases," those deviations may not establish failure "to apply procedural rules[s] regularly and consistently." In fact, the Court of Appeals holding in this case conflicts with its own prior decision which held that, despite one prior decision of a state court ignoring a procedural default, Florida courts consistently applied the procedural bar. Delap v. Dugger, 890 F.2d 285, 300-01 (11th Cir. 1989).

This is a case where the federal courts have not shown respect for Alabama's adequate and independent state procedural ground. In the words of Justice O'Conner:

> This is a case about federalism. It concerns the respect that federal courts owe the states and the states' procedural rules when reviewing the

> claims of state prisoners in federal habeas corpus.

Coleman v. Thompson, 111 S.Ct. 2546, 2552 (1991).

STATEMENT OF THE CASE

Since the only issue before this Court relates to Cochran's Batson claim, the State of Alabama's discussion of the prior court proceedings will be limited to those matters that pertain to the Batson claim. The federal district court's grant of guilt stage relief, and the Court of Appeals' affirmance, based upon the Batson v. Kentucky, 476 U.S. 79 (1986), claim was error because both courts (for different reasons) disregarded the fact that the claim was procedurally barred.

A. The Procedural Posture of the Batson Claim

1. The Trial Court

Cochran was initially tried in August of 1977. A mistrial was granted during the trial of that case. Cochran, 500 So.2d at 1165, 1181. On February 28, 1977, before that initial trial, Cochran filed a "motion to restrict prosecutorial strikes" which requested that "the District Attorney and his staff be restricted from using their peremptory strikes in a racially biased manner and, in the alternative, that the District Attorney and his staff not be allowed to use the peremptory strikes." At the trial, there was no objection raised to the prosecution's use of peremptory challenges.

Cochran was re-indicted, convicted, and sentenced to death in 1978. On March 31, 1981, that conviction and sentence were

reversed on authority of Beck v. Alabama, 447 U.S. 625 (1980).

Cochran was tried again, for the third time, and convicted in March of 1982. This is the trial and conviction which is the subject of Cochran's federal habeas corpus petition.

The record of the 1982 trial shows that at the conclusion of the voir dire of the jury and before the actual striking of the jury began, defense counsel reversed his motion, initially filed at the first trial, by stating "we move at this time to have His Honor restrict the State from arbitrarily stiking blacks from the jury."

2. The Direct Appeal of the Conviction

On direct appeal, Cochran's conviction and sentence were affirmed by the Court of Appeals. Cochran v. State, 500 So.2d 1161 (Ala.Crim.App. 1984). Cochran did not raise the claim concerning the peremptory

strikes made by the State. The Alabama Supreme Court remanded the case "to the Court of Criminal Appeals for that court to order a new sentencing hearing, at which the trial judge is required to issue specific written findings on all evidence of mitigating factors." Ex parte Cochran, 500 So.2d 1179, 1186-1187 (Ala. 1985). In his appeal to the Alabama Supreme Court, Cochran did not raise the claim concerning the peremptory strikes made by the State.

The case of Batson v. Kentucky was decided on April 30, 1986. On May 27, 1986, the Court of Criminal Appeals extended its original opinion to state that the trial court properly did not hold a new sentencing hearing and that the ministerial duty of correcting the sentencing order had been accomplished by the trial court. Cochran v. State, 500 So.2d 1188 (Ala.Crim.App. 1986). In its review of the case, the Alabama Supreme Court agreed with

the lower appellate court and stated that a new sentencing hearing was not necessary since the trial court only had to correct its original sentencing order. Cochran's appeal became final on April 27, 1987 when the United States Supreme Court denied certiorari. Cochran did not raise a Batson claim in a supplemental brief to either Alabama appellate court. Therefore, Cochran did not properly raise a peremptory strike claim at trial or on appeal, although he could have done so.

3. The Petition And Resulting Evidentiary Hearing Conducted According To Rule 32[5] Of The Alabama Rules Of Criminal Procedure

On June 12, 1987, Cochran filed a Rule 32 petition attacking his conviction and sentence. R13-TabR-62-163.[6] This petition did not raise a Batson claim. On February 1, 1988, Cochran filed an amendment to the Rule 32 petition raising a Batson claim for the first time in a state court. R1-3-TabR-62-183. This claim was raised as an independent constitutional

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[5]The petition was filed pursuant to Temporary Rule 20 of the Alabama Rules of Criminal Procedure. Upon the permanent adoption of the rules, Temporary Rule 20 became Rule 32.

[6]All references are made according to the instruction of the Court of Appeals. To be consistent, the State of Alabama will continue with the Court of Appeals' reference system.

violation and not as an ineffective assistance of counsel for not raising a Batson claim. An evidentiary hearing was held on the Rule 32 petition by Judge Cole on February 16, 1988.

On the day of the evidentiary hearing, there was much discussion on whether the Batson claim was in procedural default. It is clear from the following colloquy that the Batson claim was held procedurally barred by the Rule 32 trial court:

> MR. GIBBS [assistant attorney general]: This case was on direct appeal when Batson was decided. My only -- The State's only position is that it's a valid State's procedural rule, Rule 20.2(a)(2) and (5), prohibit this Court from hearing the case. And that's the State's position.
>
> MR. SOGOL: [Cochran's attorney]: And I think that -
>
> THE COURT: I was under the impression I just adopted that -- your ruling or your explanation of it. Didn't I say I wouldn't touch it?
>
> MR. SOGOL: Well, I wasn't sure if Your Honor was talking at that point as to whether it was still an issue

> in the competency of counsel issue. And that's why I guess I went on to explain our position. If Your Honor is going to hold that we're procedurally barred, then we won't present it.
>
> THE COURT: I so rule.

R1-3-TabR-60-22-23. At this point, Cochran's counsel made an oral request to amend the petition to include an ineffective assistance of appellate counsel claim because counsel failed to raise the Batson issue. R1-3-TabR-60-24. The State of Alabama objected to the oral amendment. R1-3-TabR-60-25. The Rule 32 trial court agreed with the State and did not allow the oral amendment. R1-3-TabR-60-28. No evidence was presented at the evidentiary hearing relating to Batson. In addition to orally holding the Batson claim procedurally barred, the Rule 32 trial court denied the Batson claim in the alternative, because it lacked merit. R1-3-TabR-61-157-159.

4. The Appeal From The Denial Of The Rule 32 Petition

In his brief to the Court of Criminal Appeals on appeal from the denial of his Rule 32 petition, Cochran raised the independent Batson claim and the claim of ineffective assistance of appellate counsel for not raising a Batson claim. The Alabama Court of Criminal Appeals held the independent Batson claim procedurally defaulted because it could have been but was not raised on direct appeal. Cochran v. State, 548 So.2d 1062, 1067-1068 (Ala.Crim.App. 1989). The Court of Criminal Appeals also held that, alternatively, the Batson claim lacked merit. Cochran, 548 So.2d at 1063-1069.

The Court of Criminal Appeals also acknowledged that the Rule 32 trial court acted properly in not allowing Cochran to orally amend his petition to include a

claim of ineffective assistance of appellate counsel for not raising Batson. Cochran, 548 So.2d 1074-1075. The Court, alternatively held the Batson ineffective assistance of counsel claim to be without merit. Cochran, 548 So.2d at 1069-1070.

5. The Federal Habeas Petition

On October 3, 1990, Judge Pointer denied Cochran discovery on the Batson[7] claims stating that they were procedurally barred. R-1-6-2,3-4 (This opinion can be found in the appendix to the petition). Despite holding Batson procedurally barred and denying a motion for reconsideration of this ruling, the federal

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[7]The independent Batson claim was addressed by Judge Pointer on page two of his order and the Batson ineffective assistance of counsel claim was addressed on pages three and four.

district court, after holding an evidentiary hearing on other issues, held that the Batson claim was not procedurally defaulted but denied the claim on the merits. Opinion of June 9, 1993, R1-23-10-15. Cochran filed a motion titled "Petitioner's Motion for Reconsideration and Request to Alter or Amend Judgment and Findings" which the federal district court granted on July 21, 1993.[8]

After holding an evidentiary hearing on the Batson claim, the federal district court granted Cochran habeas relief based upon the independent Batson claim. Opinion of November 24, 1993. The federal district court ruled that the Batson claim was not procedurally barred because the last state

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[8]This motion requested that the federal district court hold an evidentiary hearing on the Batson claim.

court rendering a judgment in the case did not clearly and expressly state that its judgment rested on a state procedural rule. R1-23-10-15; Harris v. Reed, 489 U.S. 255, 263 (1989). The State of Alabama argued that both the state circuit court and the Alabama Court of Criminal Appeals made clear and express statements that the Batson claim was procedurally barred.

6. The Court of Appeals' Opinion

The Court of Appeals affirmed the federal district court on other grounds and offered no opinion regarding whether the Alabama Court of Criminal Appeals clearly and expressly relied on the state procedural bar. Instead, the Court of Appeals held that, in cases in the same

procedural context as Cochran's,[9] the Alabama courts "have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain claim at trial." Cochran v. Herring, 43 F.3d at 1409. As a result, the Court of Appeals held that the procedural bar does not constitute an adequate and independent state ground which bars federal review.

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[9]As the Court of Appeals stated "[t]he procedural posture of Cochran's case is unusual." Cochran, 43 F.3d at 1409. The Court of Appeals identified these unique characteristics as follows: The case was tried pre-Batson, but the Batson issue was preserved because Cochran asserted a Swain objection; Cochran did not challenge the selection of the jury while the case was on direct review; Batson was decided after Cochran's conviction was affirmed, but while his sentence was still being reviewed by the Alabama Court of Criminal Appeals; and the Batson claim was asserted for the first time in a state post-conviction proceeding. Cochran, 43 F.3d at 1409.

REASONS FOR GRANTING REVIEW

I. THE SUPREME COURT SHOULD GRANT REVIEW OF THIS PETITION TO RESOLVE THE SPECIAL AND IMPORTANT FEDERAL QUESTION RELATING TO THE FEDERAL DISTRICT COURT AND THE COURT OF APPEALS ERRONEOUSLY REVIEWING THE MERITS OF A CLAIM THAT THE STATE COURTS HELD WAS PROCEDURALLY BARRED BECAUSE OF A STATE PROCEDURAL RULE

Under the doctrine of procedural default, a federal court is barred from reaching the merits of a state prisoner's federal habeas claim where there is a failure to comply with an independent and adequate state procedural rule. Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977). A federal court is not required to honor a state procedural ruling unless the ruling rests on an independent and adequate state ground.

On direct appeal, Cochran did not raise the claim concerning the peremptory strikes made by the State. The fact that Cochran

did not raise this claim on direct appeal is uncontroverted and unrefuted. Alabama has a procedural rule that states "[a] petitioner will not be given relief under this rule based upon any ground ... which could have been but was not raised on appeal ...." Rule 32.2(a)(5), Alabama Rules of Criminal Procedure. Therefore, it is clear that the independent Batson claim was in procedural default because it could have been but was not raised on direct appeal.

Cochran's state post-conviction counsel did attempt to raise a Batson claim at the post-conviction evidentiary hearing. As stated in this brief at pp. 9-11, the state circuit court clearly held the independent Batson claim procedurally defaulted because the claim had not been raised on direct appeal. At this point, which was minutes before the state court evidentiary hearing was to begin, Cochran's state post-

conviction counsel made an oral request to amend the petition to include an ineffective assistance of appellate counsel claim because counsel failed to raise the Batson issue. R1-3-TabR-60-24. The State objected to this last-minute amendment and the state circuit court sustained the objection and did not allow the untimely oral amendment.[10] R1-3-TabR-60-28. No evidence was presented at the state court evidentiary hearing relating to Batson.

In his brief to the Alabama Court of Criminal Appeals on appeal from the denial of his Rule 32 petition, Cochran raised the independent Batson claim and the claim of

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[10]In Alabama, it is within the post-conviction court's discretion on whether to allow an amendment. Rule 32.7(b), Alabama Rules of Criminal Procedure.

ineffective assistance of appellate counsel for not raising the Batson issue. Based upon the state procedural ground for not raising the claim on direct appeal, the Alabama Court of Criminal Appeals ruled that the independent Batson claim was procedurally defaulted. Cochran v. State, 548 So.2d 1062, 1067-1068 (Ala.Crim.App. 1989). The Alabama Court of Criminal Appeals also upheld the post-conviction trial court's refusal to allow the last minute amendment to include a claim of ineffective assistance of appellate counsel for not raising Batson. Cochran, 548 So.2d at 1074-1075. Since the Alabama Supreme Court denied certiorari, the Alabama Court of Criminal Appeals was the last state court to review the Batson claim. The ruling by the state courts that the Batson claim was procedurally barred should have been honored by the federal courts because: the State of Alabama asserted the

default in a timely manner; Alabama has an applicable procedural rule that Cochran violated; Alabama's procedural rule is adequate and independent; and the Alabama state courts actually relied upon the procedural rule to deny Cochran relief.

The federal district court and the Court of Appeals did not honor the state courts' ruling that the Batson claim was procedurally defaulted, but for different reasons. The federal district court held that the Alabama Court of Crimina Appeals did not clearly and expressly rely on the state procedural bar because the state court addressed the merits of the underlying federal claim in deciding the procedural state law question. R1-22 at 11-12. The Court of Appeals affirmed the federal district court on other grounds and offered no opinion regarding whether the Alabama Court of Criminal Appeals clearly and expressly relied on the state

procedural bar. Instead, the Court of Appeals held that, in cases such as Cochran's, the Alabama courts "have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain objection at trial." Cochran v. Herring, 43 F.3d at 1409.

To the best of the State of Alabama's knowledge, there are three cases[11] that share the following characteristics: the case was tried pre-Batson; a Swain objection was made at trial; the issue regarding the selection of the jury was not raised on direct review in the state appellate courts. In Cochran and

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[11]The three cases are the present case and Ex parte Floyd, 571 So.2d 1234 (Ala. 1990); and, Morrison v. State, 551 So.2d 435 (Ala.Crim.App. 1989).

Morrison,[12] the state post-conviction courts properly held that the Batson claim was procedurally defaulted because the claim had not been raised on direct appeal. In Floyd, the Alabama Supreme Court erroneously remanded the case for a Batson hearing, despite the Batson claim being procedurally defaulted. Therefore, of the three cases that share the above-stated characteristics, the Alabama state courts did not correctly apply the procedural bar in only one of those cases.

In its opinion in the Floyd case, the Alabama Supreme Court noted several

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[12]In a supplemental motion to the Court of Appeals, the State of Alabama filed papers which show that Morrison's habeas petition was denied on January 19, 1995. However, because of the Court of Appeals' ruling in Cochran, the Morrison federal district court stated that it "shall reserve final ruling on this matter until ... the United States Supreme Court disposes of the Cochran case."

characteristics that were present in Floyd, that were not present in either Cochran or Morrison. First, is the manner in which the Swain objection was raised at trial. In the Floyd case, defense counsel, following the selection of the jury, moved for a mistrial and asked that a new jury be impaneled on the ground that the pattern of strikes by the district attorney was a systematic exclusion of all blacks from the jury. Ex parte Floyd, 571 So.2d at 1222. Defense counsel then presented evidence that the district attorney used his first 11 strikes to remove the 11 black members of the jury venire. Id. After this presentation, defense counsel questioned the district attorney about the use of his peremptory challenges. The district attorney responded that he struck people who "would tend to acquit rather than convict" and that his motive was not driven by the race of the struck jurors. Id.

Defense counsel's motion for mistrial was denied and the trial began.

There was no such extensive objection made in the present case or in the Morrison case. The record of Cochran and Morrison show that in both cases defense counsel made a written pro forma motion to restrict the state from arbitrarily striking blacks. After the jury was selected in both cases, there was no objection to the State's use of its peremptory strikes.

The other key difference between Floyd, Cochran, and Morrison is the manner in which the Batson issue was raised in the direct appeal process. In Floyd, the state court direct appeal process ended when the Alabama Supreme Court denied rehearing on February 28, 1986, prior to the decision of the United States Supreme Court in Batson

v. Kentucky on April 30, 1986.[13] Floyd timely filed a petition for certiorari in the United States Supreme Court and in that petition he raised the Batson issue. This was Floyd's first court filing after the Batson decision was announced and his only opportunity on direct appeal to raise his Batson challenge. Despite opportunities to do so, neither Morrison nor Cochran raised a Batson claim during their direct appeals process.

Floyd is the only decision that is an example of an Alabama court not applying a procedural bar to a Batson claim in a case similar to Cochran's. This Court has indicated that when state courts have

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[13]Floyd, like Cochran and Morrison, did not raise a Swain claim in the state appellate courts during the direct review process.

followed a rule "faithfully" in the "the vast majority of cases," and have deviated from the procedural bar in only a "few cases," those deviations may not establish failure "to apply procedural rule[s] regularly and consistently." Dugger v. Adams, 489 U.S. 401, 410 n. 6 (1989). The Alabama state appellate courts correctly applied the state procedural rule in the present case (Cochran) and the Morrison case.

In Dugger v. Adams, the death row inmate argued that the Florida Supreme Court did not consistently and regularly apply its procedural rules regarding Caldwell claims because in several cases the court addressed the merits of the argument. However, this Court ruled that "[i]n the vast majority of cases ... the Florida Supreme Court has faithfully applied its rule that claims not raised on direct appeal cannot be raised on post conviction

review. Dugger v. Adams, 489 U.S. at 410 n.6. Although only three Alabama cases share the same characteristics pertaining to the procedural context of the Batson claim the Alabama state appellate courts correctly applied state procedural grounds in a majority of the cases.

The Court of Appeals' decision in this case is also contrary to its own precedent. In Delap v. Dugger, 890 F.2d 285, 299-301 (11th Cir. 1989), the habeas petitioner argued that one prior decision of the Florida Supreme Court demonstrated that the procedural bar imposed by the Florida courts had not been regularly applied in similar circumstances. In rejecting this argument, the Court of Appeals held that, despite one prior decision of a state court ignoring a procedural default, Florida courts consistently applied the procedural bar. Delap v. Dugger, 890 F.2d at 300-301.

Likewise, the Alabama courts have consistently applied the procedural bar regarding Batson in cases such as Cochran's.

CONCLUSION

The State of Alabama respectfully requests that its petition for writ of certiorari be granted to review the important federal question raised by this petition. The Court of Appeals ruled that, in cases such as Cochran's, the Alabama courts have not consistently applied the rule of procedural default to Batson claims asserted in state collateral petitions where the defendant had raised a Swain objective at trial. Out of the three cases that are relevant, the Alabama state courts did not correctly apply the rule of procedural default in one of those cases. However, because of the Court of Appeals ruling in Cochran, both Cochran and Morrison will receive new trials despite

the state courts correctly applying the rule of procedural default. The State of Alabama respectfully requests that this Court grant certiorari because the Court of Appeals' decision is contrary to this Court's decision in Dugger v. Adams.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF ALABAMA, Petitioner

v.

JAMES WILLIE COCHRAN, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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DOCUMENT NUMBER 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA
Southern Division

JAMES WILLIE COCHRAN, Petitioner,	)	
-vs.-	)	Case No. CV 90-P-1247-S
TOMMY HERRING, Respondent.	)	

OPINION AND ORDER

In this case seeking a writ of habeas corpus with respect to Petitioner's conviction of capital murder and death sentence, the Petitioner seeks leave to conduct a certain discovery pursuant to Rule 6(a) of the Rules Governing § 2254 Cases. Petitioner seeks the following:

> (1) discovery from the prosecutor and the state trial judge relating to his claim that the State exercised its peremptory challenges to members of the jury venire in a racially discriminatory manner
> (2) discovery from Petitioner's former attorneys relating to his claim of ineffective assistance of counsel and possible causes for alleged procedural defaults
> (3) discovery of grand jury materials relating to his claims of double jeopardy, erroneous admission

of identification testimony, and possible other claims not now known by Petitioner
(4) production of the audio tape of the trial which allegedly varies from the stenographic transcript presented on appellate reviews.

Respondent's primary opposition to the request is based on its contention that the claims on which discovery is sought are ones which the federal court is precluded from considering because of procedural defaults by Petitioner in state court proceedings.

I. Peremptory Challenges.

Petitioner seeks leave to conduct discovery in various forms (request for production of documents, interrogatories, requests for admission, and depositions) to support his claim that the prosecution exercised its peremptory challenges at trial in a racially discriminatory manner in violation of the constitutional mandates announced in Batson v. Kentucky, 476 U.S. 79 (1986). If this claim is one subject to federal review, some discovery would be

appropriate under Rule 6 because of the incomplete state of the evidence presented in state court on this claim and the potential need for an evidentiary hearing in federal court.

This issue, however, was considered by the Court of Criminal Appeals of Alabama -- the "last state court that rendered judgment and provided reasons for the judgment" -- and was rejected because of a procedural default under state law. See Cochran v. State, 548 So.2d 1062 (Ala.Crim.App. 1989). While alternatively addressing (and rejecting) that claim on its merits, the Court held that Petitioner was procedurally barred from relief on the claim because of Petitioner's failure to raise this claim on direct appeal. (Batson was decided on April 30, 1986; Cochran's direct appeal was not denied by the Court of Criminal Appeals of Alabama until June 1986 and was not denied

by the Alabama Supreme Court until November 1986.)

Petitioner argues that this procedural default does not necessarily preclude a potential evidentiary hearing--and hence the need for discovery--on the Batson claim. Citing the recent decision in Johnson v. Dugger, __ F.2d __ (11th Cir. No. 89-3195; Aug. 21, 1990), Petitioner contends that a hearing is -- or at least may be -- necessary on the question of whether refusal to consider this claim would result in a "fundamental miscarriage of justice." Although Johnson may indeed expand the scope of this exception to the procedural default doctrine, it does not support Petitioner's position here. To come within that exception, even as enunciated in Johnson, the alleged constitutional violation must be one that affected the deliberative process "to such a degree that its ultimate conclusions [as to guilt or the death

sentence] are probably factually in error." Id. slip op. at 4951 (emphasis in original). A Batson claim does not meet that stringent test.

Petitioner's requested discovery respecting his Batson claim will be denied because that claim is one that this court is precluded from considering.

II. Ineffectiveness of Counsel.

In support of his claims of ineffective assistance of counsel (both as an independent ground and to show "cause" to avoid the bar of procedural defaults with respect to other claims), Petitioner seeks to depose five attorneys who have previously represented him during state court proceedings. The State argues that these claims likewise are procedurally barred because they were not raised in state court trial, on direct appeal, or at the state collateral attack.

In the current petition, Petitioner alleges numerous instances of deficient representation; however, Petitioner has presented -- or attempted to present -- only three of such claims to the State courts. While the other claims would presumably have been precluded from immediate federal review under the "exhaustion" doctrine, the State here (paragraph 53 of its answer) has waived any requirement for exhaustion, citing Thompson v. Wainwright, 714 F.2d 1495 (11th Cir. 1983).

One of the three alleged deficiencies previously raised in state court related to trial counsel's failure to preserve an issue relating to search of an automobile. This was raised in the petition seeking collateral review, but was not pressed at the hearing on that petition or pursued in the appeal to the Court of Criminal Appeals. It must be viewed as having been

abandoned, and discovery on that point should be denied.

The other two alleged deficiencies previously raised in state court have been found by the Court of Criminal Appeals to be procedurally barred under Alabama law. In Part IV of its March 1989 opinion (548 So.2d at 1074-75), that Court concluded that under Alabama procedural rules the Petitioner was precluded from amending the collateral petition to state a claim of ineffective assistance of appellate counsel in failing to raise the Batson argument on appeal. For the reasons expressed above with respect to the Batson claim itself, this court must conclude that it is precluded from considering the claim of ineffective assistance of counsel premised on the failure of appellate counsel to raise

Batson. Discovery on this issue should not be permitted.[1]

In Part II of that same opinion, the Court concluded that the claim of ineffective assistance based on failure to obtain a psychiatric examination for sentencing was barred because of the failure

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[1]A very recent case, Hollis v. Davis, __ F.2d __ (11th Cir. No. 88-7477; Sept. 25, 1990), was rendered after briefs from the parties were prepared. On initial reading, it lends support to Petitioner's contention that this court is not precluded from considering the claim respecting selection of the jury. A careful examination, however, of the case reveals that it is inapposite. Faced with the Magistrate's finding that blacks had been systematically excluded from the jury pool, the Eleventh Circuit held that the failure of the accused's attorney's to raise that issue constituted inadequate representation and therefore "cause" to avoid any procedural default. The omitted claim "could hardly have been better established by [the time of the trial], and any competent attorney practicing criminal defense in Alabama at that time should have known of it." Id., at 5307. The court specifically distinguished that claim from a Batson claim.

of Petitioner's appellate counsel -- who were different from Petitioner's trial counsel -- to raise that issue on appeal. According to Johnson v. Dugger, supra, this claim may still be subject to review in federal court under the exception for a fundamental miscarriage of justice. Accordingly, discovery on this issue should be permitted.

The remaining claims of ineffective assistance, never having been presented in state court, appear to be procedurally barred, Parker v. Dugger, 876 F.2d 1470 (11th Cir. 1989) -- unless, that is, Petitioner can come within the "cause-and-prejudice" or "fundamental miscarriage of justice" exceptions. The court concludes that the decision whether either of these exceptions applies should be made only after Petitioner's present counsel have been afforded an opportunity for discovery on matters bearing on such

issues. In concluding that discovery on such matters should be allowed, the court takes into account the fact that depositions of these attorneys, or at least some of them, are being allowed under the preceding paragraph.

Some of the alleged deficiencies of former counsel appear to relate to actions taken or omitted during the collateral attack. In Toles v. Jones, 888 F.2d 95 (11th Cir. 1989), this circuit held that a procedural default could not be excused on the basis of inadequate performance of counsel during collateral proceedings. Since the Toles decision has been vacated for an en banc review, raising the specter that deficiencies in collateral proceedings might be used to show "cause" for a procedural default, this court concludes that questions to these attorneys relating to the collateral proceedings should be

allowed during these depositions as a matter of efficiency.

III. Grand Jury.

Without deciding at this point whether Petitioner's claims respecting double jeopardy and improper admission of identification evidence are ones subject to federal review, the court concludes that Petitioner has not demonstrated a sufficient need for grand jury materials and that the requested discovery of these materials should be denied.

IV. Audio Tape.

The issue whether Petitioner's claim with respect to the alleged omission from the trial transcript of comments concerning Petitioner's prior conviction is subject to federal review is one that, if possible, should be decided after Petitioner has been afforded access to the audio tape made by the court reporter. Accordingly, if such a tape or stenographic notes can be

located,[2] Petitioner should be given access to such materials.

ORDER

In summary, Petitioner is given leave to depose his former counsel (except with respect to the Batson issue and the preservation of error with respect to the automobile search) and to review the audio tape of the trial proceedings. Petitioner is denied leave to proceed with the other discovery that has been requested.

This is the 3rd day of October, 1990.

"s/ Sam C. Pointer, Jr."
United States District Judge

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[2]The State has advised that the court reporter has thus far been unable to locate any audio tapes or notes from petitioner's trial.

DOCUMENT NUMBER 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

Southern Division

Case No. 90-P-01247-S

JAMES WILLIE COCHRAN

Petitioner,

vs.

COMMISSIONER, Alabama Department of Corrections,

Respondent.

Judgment and Writ

For the reasons contained in the attached Opinion, the petition for a writ of habeas corpus is hereby conditionally GRANTED and it is ORDERED that the petitioner, James Willie Cochran, be released unless, within 120 days from this date (or, if the case is appealed, within 120 days from the date of final disposition of the appeal), the State of Alabama either:

1. grants the petitioner a new sen-

sing hearing; or

2. commutes the petitioner's sentence from death to life imprisonment.

This the 8th day of June, 1993.

"s/ Sam C. Pointer, Jr."

United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

Southern Division

Case No. 90-P-01247-S

JAMES WILLIE COCHRAN,

Petitioner,

vs.

COMMISSIONER,

Alabama Department of Corrections,

Respondent.

Opinion

In this habeas corpus action, filed on June 19, 1990, Cochran challenges his 1982 capital murder conviction for an offense committed in 1976.[1] The case is

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[1]The 1982 trial was Cochran's third. His first, in 1977, ended in a mistrial and the second, in 1978, resulted in his conviction for capital murder. This conviction was reversed and remanded for new

(Footnote Continued)

before the court following evidentiary hearings and extensive post-trial briefs. Finding one of Cochran's many claims has merit, the court will conditionally grant the writ.

Cochran was convicted of Capital Murder under Ala. Code §13-11-2(b) (1975).[2] In the words of the state trial court:

> "Stephen Jerome Ganey was the assistant manager of the A & P Grocery Store on Green Springs Road, Homewood, Jefferson County on November 4, 1976. Between 9:30 and 10:00 P.M. the store was robbed by the defendant James Willie Cochran.

(Footnote Continued)
trial after the Supreme Court overturned Alabama's Death Penalty Statute. Cochran v. State, 400 So.2d 535 (1981). See also Beck v. Alabama, 447 U.S. 625 (1980) (finding Alabama's Death Penalty Statute unconstitutional); Beck v. State, 396 So.2d 645 (Ala. 1980) (Alabama Supreme Court's construction of the Death Penalty Statute, curing the deficiencies).

[2]Section 13-11-2(b) provides that "[r]obbery or attempts thereof when the victim is intentionally killed" by the defendant constitutes a capital offense.

> Between $200 and $700 or more was taken by the defendant. Identification was made by two witnesses.
>
> "Court finds that after obtaining the money, Defendant left the premises and was followed by Ganey. It was a 'stop and go' situation. Defendant saw Ganey follow him and would stop, point or exhibit his revolver and Ganey would stop, then Defendant would move on and Ganey would follow. This continued for about half a block until the two men left the sight of witnesses going in the general direction of a mobile home park and a motel complex to the north of the A & P shopping center. Possibly a half a mile was the distance from A & P to the mobile home park and the motel.
>
> "The Court further finds that law enforcement personnel virtually surrounded the area and in the next twenty minutes a shot was heard. The defendant was taken into custody after discarding a revolver. Nearly $250.00 with an A & P band around it was taken from his pocket. He was arrested about 10:18 P.M. The body of the victim, Ganey, was recovered an hour later under a trailer. The Court further finds as a fact that the defendant intentionally killed Stephen J. Ganey."

Cochran v. State, 500 So.2d 1161, 1171 (Ala.Cr.App. 1984) quoting Findings of Fact From Guilt Phase of the Trial, aff'd in

pertinent part, 500 So.2d 1179 (Ala. 1985), cert. denied, 481 U.S. 1033 (1987).

PROCEDURAL HISTORY

The Alabama Supreme Court affirmed Cochran's conviction on November 8, 1985, but reversed the sentence of death and remanded the case to the Court of Criminal Appeals "for that court to order a new sentencing hearing, at which the trial judge is required to issue specific written findings on all evidence of mitigating factors." Ex parte Cochran, 500 So.2d 1179 (Ala. 1985). On remand, the trial judge made specific written findings of his consideration of all statutory and non-statutory mitigating circumstance and found the aggravating circumstances totally outweighed the mitigating circumstances. The trial court considered, but found unpersuasive, testimony regarding Cochran's good prison record from August 1981 to April

1982 and his earlier employment record as a good employee. The trial court concluded that a new sentencing hearing was not warranted by the remand order. The decision of the trial court, imposing the death penalty, was affirmed. Cochran v. State, 500 So.2d 1188, 1189 (Ala.Cr.App. 1986), aff'd 500 So.2d 1064 (Ala. 1986), cert. denied, 481 U.S. 1033 (1987).

His direct appeal complete, Cochran filed a petition in 1987 for state post-conviction relief under Rule 20, Ala.R.Crim.P. Temp. The Circuit Court denied the petition after an evidentiary hearing. On appeal, the Alabama Court of Criminal Appeals denied all three of his claims for post-conviction relief: that the prosecution used its peremptory strikes in violation of Batson v. Kentucky; that his appointed trial counsel and appellate counsel were ineffective, and that the Circuit Court erred in not allowing him to

amend his Rule 20 petition. Cochran v. State, 548 So.2d 1062 (Ala.Crim.App. 1989), cert. denied 493 U.S. 900 (1989).

COCHRAN'S CLAIMS

When, as in this case, federal habeas relief is opposed by an assertion of procedural default, the initial inquiry is whether the State has established that the claim was defaulted during state proceedings by the application of an adequate and independent state rule. See Wainwright v. Sykes, 433 U.S. 72 (1977) (state procedural default bars habeas review absent a showing of cause and prejudice); Harris v. Reed, 489 U.S. 255, 262 (1989) (the adequate and independent state grounds doctrine applies to habeas petitions filed pursuant to 28 U.S.C. §2254). Unless the State makes this showing, the federal court can proceed to an examination of the merits without considering possible exceptions to the procedural default doctrine or venturing

into the quicksand of cause-and-prejudice. See Wainwright, 433 U.S. at 87; Murray v. Carrier, 477 U.S. 478 (1986).

Cochran's federal habeas petition raises twenty-one different claims, many of which were procedurally defaulted at the state level. This court will first summarize those claims that were procedurally defaulted or that, though reviewable, clearly fail on the merits. The court will then address those two claims -- specifically the Batson claim and the claim of ineffective assistance of counsel during the sentencing state of the trial -- that present closer questions on the merits and warrant a more detailed discussion. Cochran's claims will be identified by reference to the paragraph numbers of the petition.

I. Procedurally-Defaulted Claims

Cochran raises twelve claims not subject to federal review because of procedural default at the state court level.

A. Jury Selection Claims

Cochran asserts that his rights under the sixth, eighth, and fourteenth amendments were violated when at trial the judge denied three motions regarding jury selection; namely, (i) his motion to have a sequestered, individual voir dire with each potential juror, ¶¶75-80; (ii) his motion to have each prospective juror complete a questionnaire providing background information, ¶¶81-83; and (ii) his motion to be allowed two peremptory challenges for each challenge of the prosecution, ¶¶84-90.

The State correctly responds that, because none of these issues was raised at any stage of the State proceedings, either on direct or collateral review, they were

defaulted. Cochran, citing Mann v. Dugger, 844 F.2d 1446, 1448, n.4 (11th Cir. 1988), argues that, because the Alabama appellate courts undertook a plenary review of the record, these claims were impliedly addressed and rejected, and hence were not defaulted. Cochran's argument fails - Mann is inapposite. Cochran's reading of Mann calls, in essence, for a return to the deliberate bypass standard of Fay v. Noia, 372 U.S. 391 (1963), an approach rejected by the Supreme Court. See McKleskey v. Zant, 499 U.S. __, 111 S.Ct. 1454, (1991); Wainwright, 433 U.S. at 89; Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988).

B. Sentencing Claims - Default on Direct Appeal

Seven of Cochran's claims were defaulted on direct appeal: ¶¶120-123, insufficiency of evidence at sentencing; ¶¶ 124, 135, failure to instruct the jury

on unanimity regarding aggravating circumstances; ¶¶171-177, improper closing arguments; ¶¶ 178-180, improper reference by the court to Cochran's 1978 trial; ¶¶ 181-186, improper use of and argument about the victim's family during sentencing proceedings; ¶¶188-189, arbitrary, capricious and disproportionate penalty and inadequate review on appeal; ¶¶190-191, unconstitutionality of the death penalty as applied in Alabama.

A review of the record indicates that the State is correct in its assertion that these claims were not raised on appeal and are therefore defaulted. Cochran cannot demonstrate cause for this default - apart from the argument based on Mann, rejected above; thus this court is precluded from reviewing these claims.

C. Sentencing Claims - Default at Rule 20 Hearing

Cochran challenges the trial court's failure to instruct the jury that the defendant's good character and employment history could be considered mitigating circumstances, ¶¶96-99, and its exclusion of evidence regarding the lack of deterrence value of the death penalty, ¶¶116-119. Cochran did not raise these claims at his 1987 Rule 20 Petition for state collateral relief, and thus defaulted the claims at the state level. This default was clear -- Alabama law provides that claims not brought in the first petition are defaulted and will not be heard on second or successive petitions absent a showing of cause and prejudice or a showing that there has been a fundamental miscarriage of justice. Ala.R.Crim.P.20.2(b). The Eleventh Circuit has found this rule to constitute an adequate state ground for

default. Persnell v. Kemp, 835 F.2d 1567, 1575 (11th Cir. 1988). These claims were thus defaulted by the application of Ala.R.Crim.P. 20.2(b) which constitutes an adequate and independent state ground for decision and precludes review by this court.

II. Constitutionality of Alabama's Death Penalty Statute

Cochran challenges the constitutionality of Alabama's 1975 Death Penalty Statute (Act 213). He was convicted under Act 213 in 1978, but had to be retried after the Supreme Court held the statute unconstitutional. Beck v. Alabama, 447 U.S. 625 (1980). The statutory defect was then cured by the Supreme Court of Alabama in Beck v. State, 396 So.2d 645 (Ala. 1980) (Beck II). Cochran contends the Alabama Supreme Court's restructuring of the statute violated his rights under the fifth, eighth, and fourteenth amendments. He argues that this restructuring could have been performed

only by the legislature. ¶¶ 136-138. This claim is without merit. See Dobbert v. Florida, 432 U.S. 282 (1977); Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982); Atwell v. Nichols, 608 F.2d 228 (5th Cir. 1979).

III. Evidence of Guilt

Cochran makes two claims concerning evidence at the guilt phase of his 1982 trial. He first asserts that the evidence was insufficient to support the jury's verdict, finding his guilty of intentional murder in the course of a robbery. ¶¶ 42-45. He then challenges the eyewitness testimony by witnesses Jones and Peters, ¶¶ 139-170, asserting that the identifications resulted from unduly suggestive procedures (¶¶153-159) and lacked independent indicia of reliability (¶¶ 160-164). The argument is that dubious circumstantial evidence and inadmissible identification testimony led to

an unjust conviction. This court rejects these claims.

The State incorrectly contends that these claims were procedurally defaulted. They were explicitly addressed by the Supreme Court of Alabama on direct review. Ex parte Cochran, 500 So.2d 1179. That Cochran was precluded by Ala.R.Crim.P. 20.2(a)(4) from raising these issues at his Rule 20 hearing does not bar review by this court. A claim raised on direct appeal and foreclosed from state collateral review on res judicata grounds is reviewable on federal habeas. Smith v. Dugger, 840 F.2d 787, 791 (11th Cir. 1988).

Review on the merits, however, yields Cochran no relief. Cochran has shown no error by the Alabama Supreme Court either respecting the sufficiency of the evidence or the admissibility of in-court identification testimony. On the first question, the Court stated:

> We initially note that the evidence presented in this case is not unlike that produced in Ex Parte Jones; 450 So.2d 171 (Ala. 1984), where we affirmed both the defendant's conviction and his sentence of death. With respect to the evidence presented here, we have reviewed the record and we find that there was sufficient evidence from which the jury could exclude every reasonable hypothesis except that of the defendant's guilt. Cumbo v. State, 368 So.2d 871, 874 (Ala. Crim. App. 1978).

Cochran, 500 So.2d at 1185. On the second question, the Court found that "although the circumstances surrounding the identification of the defendant are troublesome, the determination of the credibility of the identification is to be left to the decision of the jury." Id. at 1184. The Court emphasized that Cochran's appellate arguments went to the weight of the evidence, not to whether the case presented jury issues. Id. This court agrees. Cochran's claims fails on the merits.

IV. The Skipper Claim

Cochran maintains that the trial court improperly ruled, in violation of Skipper v. South Carolina, 476 U.S. 1 (1986), that his prison record and employment history were not mitigating circumstances. Contrary to the State's contention, this claim is not procedurally defaulted but is reviewable here under Smith for the same reasons outlined in Section III.

Once, again, however, review on the merits does not yield Cochran any relief. Cochran argues that the trial court violated Skipper, as well as Eddings v. Oklahoma, 455 U.S. 104 (1982), because it rules "as a matter of law that Petitioner's employment history and good prison record were not mitigating circumstances." ¶ 100. The record does not support this assertion; rather it shows that the trial court considered the evidence but found it unpersuasive. Cochran v. State, 500 So.2d

1188, 1189 (Ala. Cr. App. 1986). Skipper and Eddings focus on the fact that the sentencing authority should consider certain types of evidence; they do not mandate what weight should be given such evidence. Accordingly, Cochran's Skipper claim must fail.

V. Double Jeopardy Claims

Cochran makes two claims invoking the double jeopardy clause of the Fifth Amendment. Both are based on the fact that he was originally indicted under Ala. Code ¶ 13-11-2(m) (1975) on a charge of murder committed within 20 years of a prior murder conviction, namely a conviction in 1961 of second degree murder. His trial on this indictment began on August 15, 1977, but ended the same day in a mistrial because the District Attorney had failed to disclose to Cochran's counsel evidence regarding two material eyewitnesses. At a post-trial suppression hearing on September 8, 1977,

Cochran moved to quash the indictment for lack of proof that he was the same James Willie Cochran convicted of the earlier murder. The trial court granted the motion to quash.

Both of Cochran's current double jeopardy claims focus on the quashing of the indictment. Cochran claims that his reindictment and trial under Ala. Code ¶ 13-11-2-(b) (1975) violated the double jeopardy clause. ¶¶ 50-52. He also challenges the State's use of the 1961 conviction as aggravating evidence at the sentencing phase of the trial and its reference to the 1961 conviction in closing argument. ¶¶55, 109-110.

The double jeopardy claim with regard to sentencing is subsumed by the issue regarding reindictment. If the State violated the double jeopardy claim in retrying Cochran, the question respecting sentencing is moot. If not, then Cochran

cannot show a separate violation of his rights at the sentencing hearing alone.

The double jeopardy claim was admittedly defaulted on direct review. While Cochran argues at length that there was "cause" for this default, it appears that the claim also meets the fundamental miscarriage of justice exception to the procedural default rule. The paradigm case involving the fundamental miscarriage of justice is "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Smith v. Murray, 477 U.S. 527, 537 (1986) quoting Engle v. Isaac, 456 U.S. 107, 135 (1982). Although Cochran's double jeopardy claim does not focus on actual innocence, it is premised on the assertion that after dismissal of the first indictment he should never have been tried on the subsequent charge, which certainly challenges the fundamental justice of his conviction on that charge.

On the merits, however, this court concludes that Cochran was not under jeopardy at the time the initial charges were dismissed. Jeopardy did attach when the jury was sworn on August 15, 1977. See United States v. Jorn, 400 U.S. 470, 479 (1971). The trial court declared a mistrial that same day, however, and discharged the jury on a motion by Cochran premised on the prosecution's failure to make pretrial disclosures. The indictment was not quashed until three weeks later at the September 8th hearing. The double jeopardy clause does not ordinarily prevent retrial of a defendant after a mistrial granted on the defendant's motion. Jorn, 400 U.S. at 476. "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." United States v. Scott, 437 U.S. 82, 93 (1978). When Cochran moved for

mistrial on August 15, 1977, he made such a choice, and the state had the right at that time to retry him. At the September 8, 1977, hearing, therefore, he was no longer under jeopardy, and the double jeopardy clause was not implicated when the court quashed the indictment. See Serfass v. United States, 420 U.S. 377, 389 (1975) (jeopardy does not attach when for similar reasons an indictment is dismissed before trial). To the extent that Cochran argues that his double jeopardy claim should be viewed as if this mistrial never occurred. (see ¶ 52), the court rejects the argument.

Even without the intervening mistrial, Cochran's double jeopardy claim would likely fail. As noted, the indictment was quashed because the Court found that the State lacked evidence at that time to prove that Cochran was the same James Willie Cochran who had been convicted of second degree murder in 1961. Cochran's argument is that,

under United States v. Martin Linen Supply Co. 430 U.S. 564, 571 (1977), a defendant is acquitted for double jeopardy purposes when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." Id. But Martin no longer applies where a defendant "obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence". Scott, 437 U.S. at 100. The Scott court rejected that part of Lee v. United States, 432 U.S. 23, 30 (1977), which had held that "where a mid-trial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, . . . further prosecution is barred by the Double Jeopardy Clause", and distinguished such a case from the holding of Martin. 437 U.S.

at 97. Scott replaced this test with one that asks whether the court or jury ruled on the guilt or innocence of the defendant. Scott 437 U.S. at 101.

Thus, even if jeopardy existed when the indictment was quashed, Cochran's double jeopardy claim would apparently fail under Scott. The dismissal of his indictment did not involve a question of guilt or innocence of murdering Stephen Ganey, but rather only whether the State had evidence at the time to show he was guilty of an earlier crime that would make the Ganey murder punishable by death.

VI. The Batson Claim

Cochran claims that the jury at his 1982 trial was selected in violation of Batson v. Kentucky, 476 U.S. 79 (1986). ¶¶ 57-90. The venire at this trial consisted of 42 people, nine of whom were black. The State used seven of its fourteen peremptory strikes to strike blacks. ¶ 65. This

statistical evidence is the key support for Cochran's assertion that the State struck the blacks for racially discriminatory reasons.[3]

Batson was decided at a time during the state court proceedings when Cochran's case was under submission to the Court of Criminal Appeals on direct appeal. The State argues that Cochran's failure to raise immediately this issue constituted a default on direct review and therefore precludes federal review. This argument fails. To succeed on an assertion of procedural default, the State must demonstrate that the

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[3]Cochran does point to other evidence. Specifically, he attempts to demonstrate in ¶¶ 70-74 that the only common characteristic of those blacks struck was their race. The claims of these paragraphs, however, contain no references to the record, nor does a review of the record yield specific evidence for the general assertions made in these paragraphs.

federal claim was defaulted at the state level by the operation of an adequate and independent state rule. Under Harris v. Reed, "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Harris 489 U.S. at 263.

Cochran did raise his Batson claim at his 1988 Rule 20 hearing, and the claim was denied on the merits. The Circuit Court began its discussion of the Batson claim:

> At the outset of this hearing this court did not wish to hear the Batson motion stating the court's consideration was precluded. The more this court thought about the issue, the more consideration of the issue was required.

Cochran v. State, 548 So.2d at 1066. The Court then reviewed the merits and concluded "[t]his court finds there was no violation of the Batson, opinion. This

court finds there was no discriminatory striking of blacks...." Id. at 1067. This ruling was reviewed by the last court to which Cochran presented his federal claims -- the Court of Criminal Appeals of Alabama -- which affirmed the decision of the Circuit Court without clearly and expressly relying on an independent and adequate state ground. See id. at 1067-70.

The Court of Criminal Appeals did not intimate that the Circuit Court's discussion of the merits was erroneous. Rather, in affirming, it stated: "we agree with the circuit judge in his finding that the record contains no plain error of any Batson violation." Id. at 1067. Although noting that "under the circumstances present Cochran is procedurally barred from relief":, id., the Court did not expressly rely on this ground, nor does its analysis demonstrate that any procedural bar was an independent state ground. Rather, after a

long discussion of procedural default, it stated:

> All facts support our conclusions that there is a plain error in the record and that there is nothing in the record to indicate or imply that the State engaged in racial discrimination in the selection of the jury.

Id. at 1069. Moreover, the Court continued to address the Batson claim on the merits when it rejected Cochran's assertion that his counsel had been ineffective for failing to raise Batson on direct appeal: "appellate counsel were not ineffective for failing to raise this issue on direct appeal simply because there was nothing in the record to indicate that Batson was, in fact, an issue." Id. at 1070.

This interwoven discussion of state procedural rules and federal constitutional claims in precisely that to which the Harris clear-statement rule is addressed. Harris simply applied the same rule to habeas review which had been adopted in Michigan v.

Long for case on direct review. The rationale for the clear statement rule -- deference to adequate and independent state grounds for decision -- applies to both types of review: it is impossible to determine whether a state ground for decision is adequate if the state court does not clearly indicate that it is independently relying on that ground. Thus, when a court, such as the Court of Criminal Appeals in this case, relies on the merits of the underlying federal claim in deciding a state law question, there is no independent state law ground for the decision. For federal review to be precluded, the basis for the decision must be "'independent' of the merits of the federal law claim." Harris, 489 U.S. 260 (citations omitted). Cochran's Batson claim is, therefore, reviewable here.

Analysis of the merits of the issue is particularly difficult because Cochran is

one of the few defendants for whom the Batson rule is retroactive.[4] Ordinarily, review of a Batson claim would begin with an analysis of whether the petitioner established at trial a prima facie showing of discriminatory strikes by the prosecutor. If so, the burden would have shifted to the prosecution to "come forward with a neutral explanation for challenging black jurors" -- an explanation, however, that "need not rise to the level justifying exercise of a challenge for cause." Batson, 476 U.S. at 97. Accordingly, the reviewing court would determine whether the trial court erred either by failing to require the prosecutor

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[4]Batson was decided in April of 1986, and the petitioner's case, though tried in 1982, was not final until 1987. Under Griffith v. Kentucky, 479 U.S. 314 (1987), Batson applied retroactively to Cochran's case.

to articulate a race-neutral reason for striking the jurors[5] or by accepting the proffered reasons as rebutting the prima facie case. Id. at 96-98.

A different type of review must be made in this case because the participants at Cochran's 1982 trial did not anticipate the rule that Batson would announce in 1986. Cochran's trial counsel did not object to the prosecution's peremptory challenges during or at the conclusion of that process. The prosecution was not asked, and did not volunteer, to explain its challenges. Nor has this court been

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[5]In post-Batson cases, the trial judge -- whose findings are to be given great deference (476 U.S. at 98 n. 21) -- often will take the safer and more expeditious court of calling for the prosecutor's explanation upon even a minimal showing of potential discrimination, rather than weighing carefully the relevant evidence to determine if a prima facie case has actually been shown.

provided with any post-hoc articulation by those who prosecuted the case as to what actually motivated their peremptory challenges. The success or failure of Cochran's Batson claim, therefore, largely depends on whether a prima facie case of purposeful discrimination can be shown.

A Batson prima facie case consists of three elements. First, the defendant must show that he is a member of a cognizable racial group and that the prosecutor used peremptory challenges to strike members of a cognizable racial group. Second, the defendant may rely on the fact that peremptory challenges provide a mechanism that enables a prosecutor to discriminate if so inclined. third, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor" used peremptory challenges to exclude jurors because of their race. Id. at 96.

If, as in this case, the defendant is black and the prosecutor peremptorily strikes blacks from the jury, the question becomes whether these facts " and any other relevant circumstances raise an inference" that the strikes were exercised because the jurors were black. Consideration should be given to all relevant circumstances that may support or refute such an inference, and deference should be given to findings by the trial judge who supervised the voir dire. Id. at 97-98.[6]

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[6]This aspect of Batson can create special problems with retroactive application of the standard. The problem is not as severe in this case as it could be, since the judge who heard and decided the Batson challenge on collateral review was the same judge who had presided when the voir dire was conducted. Deference to the trial judge's findings may, however be somewhat diminished inasmuch as the voir dire had not been conducted with an eye on the Batson standard and the findings were not contemporaneously made.

As earlier noted, the State used 50% of its strikes (7 of 14) to remove 78% (7 of 9) of the blacks from the jury. In somewhat comparable situations, the Eleventh Circuit has concluded that such statistical evidence does not, by itself, establish a prima facie case of discrimination. In United States v. Allison, 908 F.2d 1531 (11th Cir. 1990), the prosecutor used 50% of his strikes (3 of 6) to remove 50% (3 of 6) of the blacks from the jury. In United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986), the prosecutor similarly used 50% of his strikes (3 of 6) to strike 50% (3 of 6) of the blacks from the jury. Both courts concluded that a prima facie case had not been established.

> It is . . . obvious that the government did not attempt to exclude blacks, or as many blacks as it could from the jury. Moreover, the unchallenged presence of two

> blacks[7] on the jury undercuts any inference of impermissible discrimination. . . .

Allison, 908 F.2d at 1537, citing Dennis 804 F.2d at 1211. Cochran cannot overcome this standard in his attempt to establish a prima case. The State did not exclude all blacks from the jury which tried Cochran, and it used half its strikes to strike whites. Two blacks were seated on the jury.[8] Under the authority of these cases and taking into account the finding of the judge who supervised the voir dire, Cochran's attempt to show a Batson prima facie case of purposeful discrimination fails.

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[7]The third black juror was an alternate.

[8]Fourteen jurors were seated, two of whom were black. After the trial, two jurors -- whose names were drawn randomly by Cochran -- were excused as alternates, one of whom was black. Cochran v. State, 548 So.2d at 1065.

VII. Ineffective Assistance of Counsel at Sentencing

This court now addresses Cochran's two remaining claims, which challenge the conduct of the penalty phase of his trial. First, Cochran asserts that his counsel failed to seek and present mitigating evidence, thus denying him effective assistance of counsel. ¶¶ 102-108. Second, he asserts that the trial court improperly denied his motion for funds to hire an expert in preparation for trial in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). ¶¶ 111-115. These claims will be addressed together because, as in the discussion in Part V of Cochran's two separate double jeopardy claims, the second

claim (under Ake) is essentially subordinate to and dependent on the first.[9]

The State maintains that the scope of the claim of ineffective assistance of counsel articulated by Cochran in his habeas petition exceeds that presented in his Rule 20 Petition and reviewed by the Court of Criminal Appeals. Presumably, the State is referring to the fact that Cochran's Rule 20 Petition did not contain broad allegations of ineffectiveness as found in the federal petition but was more specific, viz, whether counsel was ineffective failing to "request a psychiatric or psychological evaluation for use as mitigating evidence at the

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[9]The Ake motion was made before trial, but the trial judge delayed ruling, without objection from Cochran's counsel, until after the guilt phase of the trial. See R. 21, 23; ¶ 114. Resolution of the Ake claim, therefore, depends in part on an analysis of the petitioner's broader claim of ineffectiveness of counsel.

sentencing hearing." Cochran v. State, 548 So.2d at 1070.

The difference in allegations, however, is inconsequential. In order to address the more specific claim of ineffectiveness, the state courts first had to consider whether the background investigation conducted by Cochran's attorneys indicated that a psychological evaluation was necessary and relevant. It is clear from the arguments presented by the parties to the Circuit Court,[10] and from the analysis by both

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[10]The State presented proposed findings of fact and conclusions of law which stated "Cochran's trial lawyers conducted a reasonable investigation into possible mitigation but were unsuccessful in finding any." SR-Tab 64, at 14. Cochran's attorneys argued "[a]bsolutely no investigation was done, other than to find one prior employer. No effort was made to investigate other statutory or non-statutory circumstances." SR-Tab 66, at 48.

the Circuit Court and the Court of Criminal Appeals, that what was at issue was the broad question of defense counsel's preparation for the penalty phase of Cochran's trial. See Cochran v. State, 548 So.2d at 1071, 1073.

To the extent the State's opposition is based on a contention that Cochran cannot introduce new facts in support of his claim, it also is without merit. A petitioner is not barred from introducing additional facts on federal habeas provided the claim was presented to and reviewed on the merits by the state courts. See Aldridge v. Dugger, 925 F.2d 1320, 1330 (11th Cir. 1991); Brand v. Lewis, 784 F.2d 1515, 1517 (11th Cir. 1986) ("failure to enumerate all instances of attorney error does not preclude [federal habeas] review" (citations omitted)).

The ineffectiveness-of-counsel claim here presented by Cochran, therefore, cannot

be distinguished from that presented in his Rule 20 Petition. That claim was reviewed on the merits by the last state court rendering a judgment in the case, the Alabama Court of Criminal Appeals. See Cochran v. State, 548 So.2d at 1072-74. Accordingly, it is reviewable by this court. Harris, 489 U.S. at 263 (1989).

Cochran has the burden to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). Strickland thus provides a two-pronged test. A petitioner must first demonstrate that his counsel's performance fell outside the range of professionally competent assistance. Id. at 687-88. This determination is to be made in the light of all the circumstances and facts of the case, viewed as of the time of the questioned

conduct. Id. at 690. If counsel's performance was deficient, the petitioner must then demonstrate that he was prejudiced by the error -- that there is a reasonable possibility, sufficient to undermine confidence in the outcome, that the result would have been different. ID., at 694.

Not surprisingly, analysis of Cochran's claim is complicated by the case's procedural history. A short recap is appropriate. Cochran was arrested in 1976, and his first trial (ending in a mistrial) was held in 1977. He was then tried and convicted of capital murder in 1978, but this conviction was vacated when Alabama's Death Penalty Statute was held unconstitutional in Beck v. Alabama, 447 U.S. 625. The State prepared to try Cochran for a third time, and trial was set for October 1981. Throughout this five-year period, Cochran was being represented by Mike McCormick and John Carroll. McCormick

had sole responsibility for the guilt phase of the trial, and Carroll had sole responsibility for the penalty phase. HR-III, at 8.[11] Due to a death in Carroll's family, the October 1981 trial date was postponed. Carroll subsequently withdrew as co-counsel and was replaced by Robert Shields. In March 1982 Cochran was tried again, resulting in the conviction and death penalty at issue in his habeas review.

Review by this court of a claim of ineffectiveness of counsel is de novo because it is a mixed question of fact or law. See Strickland. 466 U.S. 668. To the extent the Circuit Court made factual findings on the ineffectiveness claim, this court concludes that those facts were not

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[11]Evidentiary hearings held before this court will be identified by reference to the Hearing Record, designated as HR, followed by the volume and page number.

adequately developed at the state court hearing and are not entitled to deference. 28 U.S.C. § 2254(d)(3)

The essential flaw in the state process stems from the manner in which the Circuit Court and Court of Criminal Appeals considered the peculiar procedural history of Cochran's case. Both courts evaluated Cochran's challenge regarding the effectiveness of counsel at the penalty phase of his 1982 trial by stressing the preparation for sentencing taken by his attorneys in connection with his 1978 trial. The problem is that under the law in effect at the time of his 1978 trial there was no penalty hearing before the jury - upon finding Cochran guilty of capital murder for robbery-intentional killing, the jury was required by then-existing law to impose the death penalty. The only sentencing hearing in 1978 was before the judge, who had the authority to refuse to

impose the death sentence because of the weight of mitigating factors balanced against aggravating factors.[12]

Cochran's third trial occurred after the Alabama Supreme Court, to cure defects in the Death Penalty Act, instituted a new requirement that trials under the Act be conducted in two separate stages, a guilt stage and a penalty stage, both before the jury. At the penalty hearing, the jury would hear evidence of aggravating and mitigating factors and then recommend a sentence to the trial judge. Beck v. State, 396 So.2d at 662.

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[12]The Supreme Court found, however, that "it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence." Beck v. Alabama, 447 U.S. at 632, 645.

The investigation and preparation by counsel for the 1978 trial, while certainly relevant to his claim of ineffectiveness respecting the 1982 sentencing hearing, should be viewed with care in the light of changed conditions resulting both from a replacement of counsel and from the new legal standards effective in 1982. Unfortunately, with this point apparently not being stressed by counsel, the state courts looked to the preparations of counsel through the entire history of the case as directly bearing on the claim of ineffectiveness at the 1982 sentencing hearing. Illustrative was the Circuit Court's emphasis on an investigative report made by the probation department, dated April 5, 1978, describing who Cochran's family members were where they lived, his work history, and his prior convictions. The Circuit Court noted:

> "A full and complete investigative report was made by the probation department. Is there anything in this report that gives rise to the need for a psychiatric or psychological evaluation? After reading the report, how can an attorney be deemed incompetent when there is nothing that alerts, prompts or raises the need of an evaluation?"

Cochran v. State, 548 So.2d at 1072. This report, however, was not prepared with the aim of identifying mitigating evidence that would be relevant after Beck, and does not appear to have been relied on by defense counsel in deciding how to prepare for the sentencing hearing in 1982.

The significance of Beck to attorneys preparing for the penalty phase of a capital case was explained by John Carroll when testifying before this court:

> "[Before Beck] my general practice was not to focus on the penalty phase because it was essentially a waste of time. I think the death penalty sentencing rate in Alabama at that time was almost a hundred percent. A judge did the sentencing and the jury was required to, if they found the defendant guilty, automatically sentence him to

> death and I think there was absolutely no realistic possibility of having any effect in the penalty phase in the pre-Beck cases."

HR-III, at 9. According to Carroll, defense counsel would not have included an extensive background investigation of their clients to prepare for pre-Beck sentencing. He testified that after Beck, however, preparation for the penalty phase changed considerably:

> "I . . . would have interviewed the client, found out as much as [I] possibly could from him about his background, talked to people in his family, his mother, his father, his relatives and tried to get access to whatever hard records[13] there might be about the particular individual, learn as much as we possibly could about his life, essentially from birth to the time of trial."

HR-III, at 11.

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[13]Carroll further testified that hard records included school, hospital, and prison records. Id. at 12.

Carroll's testimony highlights what was apparently not clear at the Rule 20 hearing; namely, that the type of penalty-phase preparation done for Cochran's 1977 and 1978 trials was quite different from that needed to prepare for the 1982 trial. As a result, the Circuit Court erroneously relied on the preparation done by McCormick and Carroll for the 1977 and 1978 trials, and on the 1978 probation office investigative report, as an answer to Cochran's charge of ineffectiveness at the 1982 sentencing hearing.

This same error was carried forward when, on review, the Court of Criminal Appeals concluded:

> From the testimony at the post-conviction hearing, we conclude that Cochran's defense counsel did not request a mental evaluation because there was no reasonable indication that such an evaluation would have been beneficial to Cochran's defense at trial or that it would have supplied mitigating evidence at sentencing. A tactical

decision had been made to emphasize the weakness of the State's case.

Cochran v. State, 548 So.2d at 1073. As evidence of this "tactical decision," the Court quoted Carroll's testimony at the 1988 Rule 20 hearing: "we decided to fight the battle in this case on the guilt-phase. Because, as I recall, we had a guilt-phase defense or at least the State's evidence in the guilt phase was not all that strong.." Id. at 1073. Carroll was, however, referring to the 1978 trial, the last trial he worked on, and the tactic he described is consistent with the testimony before this court that, pre-Beck, defense counsel had little choice but to take that approach.

The proper focus must be on the preparation of defense counsel for the 1982 trial. Until October of 1981, all background investigation for the purposes of identifying potential mitigating evidence was the responsibility of Carroll, who had a

number of years experience in defending capital cases. Carroll testified before this court that he had had sole responsibility for the penalty phase of the case (HR-III, at 8); that a background investigation would have been critical to an adequate penalty phase defense (HR-III, at 12, 42); and that he did not remember -- and his files did not reflect -- preparing such a background investigation on Cochran prior to withdrawing from the case a few months before the 1982 trial (HR-III, at 12). Though lacking specific recollection, Carroll indicated that he "probably did not do such an investigation." This court finds Carroll did not conduct the investigation that, he concluded, would have been required

to prepare adequately for the penalty phase of the case.[14]

Robert Shields, who assisted McCormick after Carroll's withdrawal, testified that he began working on the case in January or

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[14]Carroll testified that the death of his mother in October 1981 and of his father in April 1982 made that period of time a "blur" in his memory. HR-III, at 14. Indeed, these personal problems led to his withdrawal from the case. Although Carroll's memory was clouded by these events, this court notes that Carroll was one of the attorneys who briefed Beck v. Alabama, before the Supreme Court, Beck, 447 U.S. 626, and it stands to reason that he was acutely aware of increased relevance and importance of a background investigation. In light of this, had Carroll conducted an investigation of Cochran, this court would expect Carroll's files to contain some record of it, even if the only records were notes indicating that he was not turning up anything. In addition, this court notes that Carroll's personal crises in late 1981 and early 1982 do not seem to dim his memory more than normal for representations conducted prior to October 1981. At the hearings before this court he clearly remembered a background investigation and penalty phase preparation done in another capital case that he had completed in the middle of 1981. Id.

February of 1982, (HR-III, at 171) and that Cochran's case was the first he had worked on where the death penalty was an available sentence (HR-III, at 1972). Like Carroll, he had sole responsibility for the penalty phase of the trial. HR-III, at 71. Shields testified that he first talked to Cochran immediately before trial (HR-III, at 172) and had no recollection of conducting any background investigation before trial (HR-III, at 172-173). He did attempt to contact Cochran's relatives in New York after the guilt phase of the trial. HR-III, at 176, 178.

It is clear from the evidence presented that no background investigation of Cochran was ever performed. McCormick testified unequivocally that he never conducted such an investigation. HR-III, at 75. As noted above, Carroll's testimony strongly indicates that he never conducted one, and Shield's testimony demonstrates that his

investigation, if any, occurred after the guilt phase and before the sentencing hearing -- a period of fifteen hours.[15]

The standard governing counsel's duty to investigate a client's background for purposes of developing mitigating evidence is clear in this Circuit: "[a] lawyer . . . must first evaluate the potential avenues of investigation and then advise the client of their merit." Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986). "A strategy of silence may be adopted only after a reasonable investigation for mitigating evidence or a reasonable decision that an investigation would be fruitless." Id. citing Strickland v. Washington, 466 U.S. at 690-91. Even if

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[15]The guilt phase ended at 5:25 p.m. on March 25, 1982. The sentencing phase began at 9:00 on March 26, 1982. SR-Tab 19, at 1047; SR-Tab 20 at 1048.

a client advises counsel not to investigate, or is not readily forthcoming with information, this refusal should not be blindly followed, counsel still has a basic duty to investigate. Thompson v. Wainwright, 787 F.2d 1447, 1450-51 (11th Cir. 1986). See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991).

The lack of investigation conducted prior to Cochran's 1982 trial constitutes deficient performance under Strickland. Both the testimony before this court and the record reflect that, if any investigation was done, it was cursory and hurried. This case is similar to Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), where the defendant's counsel did not attempt to investigate his background until immediately prior to sentencing. In holding that this constitutes ineffective assistance of counsel, the court stated: "it should be beyond cavil that an attorney who fails

altogether to make any preparations for the penalty phase of a capital murder trial deprives his claim of reasonably effective assistance of counsel by any objective standard of reasonableness." Id. at 763, citing Black for Kemp, 758 F.2d 523, 533 (11th Cir. 1985) cert. denied, 474 U.S. 998 (1985). See also Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991).

Having found deficient performance by Cochran's counsel, the court next addresses the prejudice prong of Strickland. The first task is to identify what evidence would have been available had there been an adequate investigation. Second, this evidence must be compared to what was actually introduced in mitigation at Cochran's trial to determine whether its omission prejudiced Cochran.

It is clear from the evidence before this court that an investigation of Cochran's background would have yielded

substantial amounts of admissible, potentially mitigating evidence including: evidence of Cochran's turbulent family history and borderline intellectual functioning;[16] evidence of his mental illness and organic brain damage;[17] evidence of his exemplary behavior in prison after his 1961 conviction;[18] and evidence that friends and family would have testified that Cochran made a positive

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[16]HR-I, at 75, 152, 167-71. Mitigating under Blanco, 943 F.2d 1477.

[17]HR-I, at 76, 81, 153. Mitigating under Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986).

[18]See generally Alabama Department of Corrections Prison Records. Mitigating under Skipper v. South Carolina, 476 U.S. 1 (1986).

contribution to his family and the community.[19]

What was actually introduced by the defense at the trial was limited to evidence of Cochran's prison record while in county jail from April 1981 to April 1982, and testimony of a former employer that Cochran had not been a discipline problem before being discharged.[20] The paucity of

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[19]HR-I, at 168; HR-III at 130. Mitigating under Harris, 874 F.2d at 763.

[20]The very fact that Cochran's counsel introduced this evidence at all undermines the State's argument that the failure to introduce more evidence in mitigation was a strategic decision by defense counsel. Counsel clearly attempted to use what little background information they had uncovered, an approach which indicates that, had they investigated and discovered the additional mitigating evidence, they would have introduced it. The argument that this evidence was withheld from the jury as a matter of strategy need be addressed no further because, as noted above, such a decision can be made only after an investigation of available evidence, which

(Footnote Continued)

this presentation is perhaps best demonstrated by the finding of the trial judge that it should be given no weight -- thus causing the aggravating circumstances to outweigh the mitigating circumstances. Cochran v. State, 500 So.2d at 1189. While the trial court was not compelled under law to sentence Cochran to death, the Court of Criminal Appeals stated:

> While this offense is not as heinous and atrocious as many of those we have reviewed, the fact that Cochran deliberately killed an unarmed man in order to effectuate his escape after

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(Footnote Continued)
was not done in this case. See Thompson, 787 F.2d at 1450-51. The State's alternative theory to explain why additional evidence was not introduced is that the mitigation evidence now being identified has been fabricated. This argument is completely without merit. The testimony of all Cochran's family members is consistent with each other; the psychiatrists for the State and the Petitioner agree on large areas of relevant testimony, and the records available to counsel, such as Cochran's prison records, speak for themselves. See generally, HR-I, II and III.

> the commission of a robbery, when coupled with the facts that Cochran pled guilty to second degree murder in 1961 and was convicted of robbery in 1976, dictates a sentence of death.

Cochran v. State, 500 So.2d at 1178.

The State's evidence, though sufficient to support a verdict of guilt beyond any reasonable doubt, depended on circumstantial evidence and involved questionable -- although, as discussed in Section II, admissible -- eyewitness testimony. The Court of Criminal Appeals noted that the murder was not particularly heinous or atrocious, and it is clear from the evidence at trial that the murder was unplanned.[21] Compare Harris, 874 F.2d at 763-64. Although the aggravating circumstances were legitimate, therefore, there is a reasonable probability that the

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[21]See note, 2, supra and accompanying text.

judge or jury would have been sympathetic to the quality and quantity of mitigating evidence that could have been presented and would have found this evidence outweighed the aggravating circumstances. See Horn v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991); Harris, 874 F.2d at 763; Armstrong v. Dugger, 833 F.2d 1430, 1433-34 (11th Cir. 1987).

CONCLUSION

The court concludes that, with one exception, all of Cochran's claims are either defaulted or without merit. However, the court concludes that the performance of Cochran's counsel in failing to conduct a background investigation prior to the penalty phase of the case in 1982 was constitutionally deficient and that, had the judge and jury been presented the mitigating evidence that was available but undiscovered, there is a reasonable probability that "the sentencer . . . would

have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Cochran was thus denied effective assistance of counsel during the penalty phase of his trial. Accordingly, he is due a new sentencing hearing.

This the 8th day of June, 1993.

"s/ Sam C. Pointer, Jr."
United States District Judge

DOCUMENT NUMBER 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES WILLIE COCHRAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO.
	)	90-P-01247-S
COMMISSIONER,	)	
Alabama Department of	)	
Corrections,	)	
	)	
Respondent.	)	

ORDER

As a result of a July 21, 1993, conference with counsel for both parties, this court ORDERS that Respondent's Motion to Alter Judgment of June 15, 1993, is hereby DENIED. The court acknowledges that its parenthetical statement quoting Brand v. Lewis, 784 F.2d 1515 (11 Cir. 1986), on page 16 of its Opinion dated June 8, 1993, was an inappropriate reference. The court notes that the overruling of Brand in Footman v.

Singletary, 978 F.2d 1207 (11th Cir. 1992) has no effect on the outcome of this case. The court emphasizes that the issue of adequacy of representation was sufficiently considered by the state court and therefore this court properly considered the issue.

This court further ORDERS that Petitioner's Motion for Reconsideration and Request to Alter or Amend Judgment and Findings of June 22, 1993, is hereby GRANTED. Given the limitations placed by this court on the items to be presented at trial, the court recognizes that petitioner was not afforded an adequate opportunity to present evidence on the issue of the constitutionality of prosecution's exercise of peremptory challenges at trial (the Batson claim). The court therefore will afford petitioner such opportunity by opening this issue for an evidentiary hearing.

This the 21st day of July, 1993.

"s/ Sam C. Pointer, Jr."
UNITED STATES DISTRICT JUDGE

DOCUMENT NUMBER 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES WILLIE COCHRAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.
	)	90-P-01247-S
COMMISSIONER,	)	
Alabama Department of	)	
Corrections,	)	
	)	
Respondent.	)	

ORDER

For the reasons outlined in the accompanying opinion, the petition for habeas corpus is hereby conditionally GRANTED and it is ORDERED that the petitioner, James Willie Cochran, be released unless, within 120 days from this date (or, if the case is appealed, within 120 days from the date of final disposition of the appeal), the State of Alabama grants the petitioner a new trial.

This the 24th day of November, 1993.

"s/ Sam C. Pointer, Jr."
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES WILLIE COCHRAN, Petitioner,	)	
v.	)	Case No. 90-P-01247-S
COMMISSIONER, Alabama Department of Corrections, Respondent.	)	

OPINION

Petitioner James Willie Cochran brought this habeas corpus action on June 19, 1990, challenging his 1982 capital murder conviction. Among the challenges raised was a claim that the 1982 conviction was issued by a jury that had been selected in violation of Batson v. Kentucky, 476 U.S. 79 (1986). After an evidentiary hearing, this court held on June 8, 1993, that, under Eleventh Circuit precedent established in United States v. Allison, 908 F.2d 1531

(11th Cir. 1990), and United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986), Petitioner had failed to present evidence sufficient to establish a prima facie case of a Batson violation. On June 22, 1993, Petitioner filed a Motion for Reconsideration and Request to Alter or Amend Judgment and Findings, arguing that his Batson claim had not been fully heard by this court because an earlier order of this court had precluded him from fully developing evidence on the Batson issue at the evidentiary hearing. Petitioner's motion was granted, and thus a supplemental evidentiary hearing was held on November 22, 1993.

Based on the evidence presented at the November 22 hearing, this court finds that Petitioner has shown by a preponderance of the evidence that in the 1982 trial race was a determining factor in the prosecution's exercise of its peremptory challenges. As had been shown in the earlier evidentiary

hearing, Petitioner presented evidence showing that the prosecution used 7 of its 14 peremptory challenges to strike 7 of the 9 blacks on the jury venire.[1] Petitioner supplemented this showing with evidence that, in Petitioner's original trial in 1977[2] the prosecution used 9 of its first 10 challenges, as well as its 11th and 12th challenges, to strike black jurors; and in Petitioner's first retrial in 1978,[3] the prosecution used 13 of its

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[1]It was this evidence that, taken alone, was held by this court not to establish a prima facie case in the earlier hearing.

[2]This trial ended in a mistrial.

[3]This trial resulted in a conviction, which was later reversed and remanded for new trial after the Supreme Court overturned Alabama's Death Penalty Statute. Cochran v. State, 400 So.2d 435 (1981). See also Beck v. Alabama, 447 U.S. 625 (1980) (finding Alabama's Death Penalty Statute unconstitutional); Beck v. State, 396 So.2d 645 (Ala. 1980)(Alabama Supreme Court's construction of the Death Penalty Statute, curing the deficiencies).

14 challenges to strike black jurors.[4] Further, Petitioner presented evidence, in the form of oral testimony by two former prosecutors who worked for the District Attorney during the time at issue, demonstrating that there was in the District Attorney's office an informal practice of using peremptory challenges to strike black jurors at least in part on the basis of their race. Finally, the candid testimony of the prosecutor of Cochran's case indicates factors typically considered in

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[4]At the evidentiary hearing, counsel for Respondent objected to evidence from the 1977 and 1978 trials as irrelevant. This court overruled that objection, noting that the evidence was relevant because David Barber was the prosecutor in all three trials; however, the court further noted that the evidence had only circumstantial value.

the prosecution's decision to exercise peremptory challenges.[3]

The sum of this evidence indicates that, in Petitioner's 1982 trial, race was a determining factor in the prosecution's exercise of its peremptory challenges, and thus Batson was violated. Therefore, the petition for habeas corpus is hereby conditionally GRANTED and it is ORDERED that the petitioner, James Willie Cochran, be released unless, within 120 days from this date (or, if the case is appealed, within 120 days from the date of final disposition

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[3]Because of the time of the trial -- it occurred in 1982 and Batson was decided in 1986 --it was not yet the practice of defense counsel to object to the prosecutor's strikes at the time they were made, and thus the prosecutor was not asked at the trial to give explanations for his strikes. Unsurprisingly, the prosecutor is now unable to recall the specific reasons that he exercised peremptory challenges against 7 jurors in a trial held over a decade ago.

of the appeal), the State of Alabama grants the petitioner a new trial.

This the 24 day of November, 1993.

"s/ Sam C. Pointer, Jr."
UNITED STATES DISTRICT JUDGE

DOCUMENT NUMBER 5

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-7028

D.C. Docket No. 90-P-01247-S

JAMES WILLIE COCHRAN

Petitioner-Appellee,
Cross-Appellant,

vs.

TOMMY HERRING, Commissioner,
Alabama Department of Corrections,

Respondent-Appellant,
Cross-Appellee.

Appeals from the United States District
Court for the Northern District of Alabama

(January 10, 1995)

Before TJOFLAT, Chief Judge, ANDERSON and
COX, Circuit Judges.

COX, Circuit Judge:

INTRODUCTION

James Willie Cochran, an Alabama inmate, was convicted of murder after a trial by jury and sentenced to death. Cochran appealed his conviction and sentence. After exhausting his state remedies, Cochran filed a habeas petition in the United States District Court. The district court granted relief based on two claims: (1) that Cochran's counsel was ineffective at sentencing; and (2) that the prosecution used its peremptory strikes to exclude blacks from the jury in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The State appeals, arguing that both claims are procedurally barred and lack merit. Cochran cross-appeals, contending that the district court erred in denying relief on his claims that the state trial court improperly disregarded mitigating evidence at sentencing and that the consideration of a prior conviction during

the sentencing phase of his trial violates the Double Jeopardy Clause. Because we affirm the district court's grant of relief on the Batson claim, we find it unnecessary to address the other issues.

I. FACTS AND PROCEDURAL HISTORY

The State's evidence at trial was as follows. Cochran robbed an A & P Grocery Store in Jefferson County, Alabama. Stephen Jerome Ganey, the assistant manager of the store, followed Cochran out of the store. Cochran saw Ganey following him. While running away from the store, Cochran stopped several times and pointed his revolver at Ganey, causing Ganey to momentarily pause in his pursuit of Cochran. The police arrived soon thereafter and virtually surrounded the area around the A & P. Within twenty minutes a gunshot was heard. Although there were no eyewitnesses to the actual murder of Ganey, the police found Cochran within one-half mile of the A & P soon after they

heard the gunshot. At the time Cochran was arrested, he was carrying nearly $250 with an A & P band wrapped around it, and he had just discarded a revolver. Ganey's body was later found under a trailer in a nearby mobile home park.

Cochran was tried in 1982 for the murder of Ganey.[1] The venire panel for this trial consisted of forty-two potential jurors, nine of whom were black. The defendant in the case, Cochran, is black, while the victim, Ganey, was white. At the conclusion of voir dire and before the actual striking of jurors began, Cochran's counsel moved to restrict the State from

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[1]Ganey was killed in 1976. Cochran's first trial ended in a mistrial. The second trial, which resulted in a conviction, was reversed and remanded for a new trial after the United States Supreme Court overturned Alabama's death penalty statute. Thus, the 1982 trial was Cochran's third trial for Ganey's murder.

arbitrarily striking blacks from the jury. The motion was denied; however, the court stated that it would be guided by Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 825 (1965), in determining whether the State was appropriately using its peremptory strikes. In selecting the jury for the 1982 trial, the prosecution used seven of its fourteen peremptory challenges to exclude seven of the nine black members of the venire panel. After the jury was selected Cochran's counsel did not object to the manner in which the State used its peremptory strikes. A jury of eleven whites and one black found Cochran guilty of murder, and he was sentenced to death.[2]

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[2]The jury consisted of 14 people, two of whom were black. The alternates were determined by lot at the end of the trial and were then excused. One of the two alternate jurors was black.

Cochran appealed his 1982 conviction and sentence in state court. Cochran never raised the Batson claim on direct appeal; however, Batson was not decided until late in Cochran's appeal process. In 1984, the Court of Criminal Appeals affirmed Cochran's conviction. Cochran v. State, 500 So.2d 1161 (Ala.Crim.App. 1984). However, in 1985, the Alabama Supreme Court remanded the case for resentencing. Cochran v. State, 500 So.2d 1179 (Ala. 1985). The circuit court resentenced Cochran in February 1986. See Cochran v. State, 500 So.2d 1188, 1188 (Ala.Crim.App. 1986). Soon thereafter, the Court of Criminal Appeals again reviewed the sentencing. Appellate counsel filed Cochran's brief with the Court of Criminal Appeals on April 22, 1986. Eight days later, on April 30, 1986, the Supreme Court decided Batson. The Court of Criminal Appeals affirmed Cochran's sentence in May 1986, id., and the Alabama Supreme Court

affirmed that decision in November 1986. Ex parte Cochran, 500 So.2d 1064 (Ala. 1986). The United States Supreme Court denied certiorari in Cochran's case on April 27, 1987. Cochran v. Alabama, 481 U.S. 1033, 107 S.Ct. 1965 (1987).

In 1987, Cochran filed a petition for post-conviction relief under Ala.R.Crim.P.Temp. 20[3] in Alabama state court, still without making a Batson claim. Cochran raised the Batson issue for the first time on February 1, 1988, when he filed an amendment to the State petition. The amendment to the petition alleges:

> "Petitioner's rights were violated when the State struck all seven blacks from the venire, which acts and results in the petitioner being tried by an all white jury, in violation of Batson v. Kentucky--particularly when the

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[3]The rule is now codified as Ala.R.Crim.P.32.

> Court overruled both an oral and a written motion specifically anticipating an all white jury and specifically requesting the Court to prevent the prosecution from striking without good reason black jurors."[4]

The state circuit court ruled that the Batson claim was procedurally barred. However, the court also addressed the merits of the Batson claim, noting that the record did not contain any evidence of racial discrimination in the use of peremptory strikes. Specifically, the court stated: "'The composition of the jury (black v. white) is not shown in the record. We are unable to discern how many blacks and whites were on the jury. The record does not

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[4]Cochran v. State, 548 So.2d 1062, 1065 (Ala.Crim.App.)(quoting Cochran's amendment to the petition for post-conviction relief), cert. denied, 493 U.S. 900, 110 S.Ct. 259 (1989).

raise an inference that the state was engaged in purposeful discrimination.'"[5]

Cochran filed an objection to the trial court's findings on the Rule 20 motion, alleging that the trial court had not allowed him to present evidence on the Batson issue. Attached to the objection were copies of the jury list and the strike sheets which Cochran had obtained from the State. After the trial court overruled the objection, Cochran appealed. The Court of Criminal Appeals reviewed the jury list and strike sheets and concluded that "we cannot, with any degree of certainty, reach any conclusion as to the number of blacks on the venire, the number of blacks removed by peremptory challenge, or the number of blacks who actually served on the jury."

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[5]Id. at 1066 (quoting the Alabama circuit court's order).

Cochran v. State, 548 So.2d 1062, 1067 (Ala.Crim.App.), cert. denied, 493 U.S. 900, 110 S.Ct. 259 (1989). The court held that Cochran was procedurally barred from raising the Batson claim in a Rule 20 motion because he had not raised it on direct appeal. Id. at 1067-68.

After the Supreme Court denied Cochran's petition for writ of certiorari, Cochran v. Alabama, 493 U.S. 900, 110 S.Ct. 259 (1989), Cochran filed a 28 U.S.C. §2254 petition in the United States District Court. At the evidentiary hearing, Cochran presented documentary evidence, consisting of the strike sheets used by the prosecutor at Cochran's trial, as well as the testimony of Cochran's prosecutor and other members of the district attorney's office. The district court found that the evidence tended to show that the district attorney's office maintained an informal policy of striking black jurors because of their

race. The court further found that race was a determining factor in the striking of black jurors in Cochran's case. As the State offered no race-neutral reason for its peremptory strikes, the district court granted Cochran relief on the Batson claim.[6]

II. ISSUES ON APPEAL AND CONTENTIONS OF THE PARTIES

We find it necessary to address only two issue on appeal. The first issue is whether Cochran's Batson claim is procedurally barred from review by the federal courts. The State contends that the Batson claim is

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[6]Initially, the district court granted Cochran habeas relief but only on an ineffective assistance of counsel claim. Cochran moved for reconsideration of the Batson claim. As the district court found that Cochran had not been afforded an adequate opportunity to present evidence on the Batson claim, the court reconsidered the Batson claim after holding an evidentiary hearing and thereafter granted relief on the Batson claim as well.

procedurally barred because the last state court rendering a judgment in Cochran's case clearly and expressly stated that the claim was procedurally barred under Alabama law.

Cochran contends that the district court did not err in addressing the Batson claim. Cochran argues that the last state court to render judgment on the Batson claim primarily based its decision on federal law. Cochran claims that the state court plainly stated that the application of the alleged procedural default depended on the court's view that the claim lacked merit. Because the discussion of the procedural default was interwoven with federal law, Cochran contends that the procedural default was not an adequate and independent state ground for the decision which bars federal review of the Batson claim.

Moreover, Cochran contends that even if the last state court to render judgment on the Batson issue clearly and expressly

stated that its judgment rested on a state procedural bar, the district court did not err in addressing the Batson claim because Alabama courts do not strictly and regularly apply procedural defaults in cases such as Cochran's.

The second issue is whether the district court erred in finding that the prosecution in Cochran's case exercised its peremptory challenges in a racially biased manner in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The State contends that the district court clearly erred in finding a Batson violation on the facts in this case. Alabama argues that although the State used seven of its fourteen peremptory challenges to strike seven of the nine blacks on the venire, the statistical evidence alone does not establish a Batson violation. Moreover, Alabama contends that the fact that two blacks served on the jury undercuts any

inference of impermissible discrimination. However, the State offers no race-neutral reasons for striking seven blacks.

Cochran contends that the district court correctly found that the prosecution in his case violated Batson. Cochran supports his contention not only with statistical evidence, but also with the testimony of members of the district attorney's office. Cochran contends that the evidence not only shows a policy of race discrimination in jury selection at the time Cochran was being tried, but also shows actual discrimination in the selection of Cochran's jury.

III. STANDARDS OF REVIEW

The district court's holding that, under the facts of this case, the Batson claim is not procedurally barred is a mixed question of law and fact subject to de novo review by this court. See Tower v. Phillips, 7 F.3d 206, 210 (11th Cir. 1993). The ultimate question of whether Cochran has established

purposeful discrimination in violation of Batson is a question of fact subject to deferential review. A district court finding of purposeful discrimination in violation of Batson will not be overturned unless clearly erroneous. Hancock v. Hobbs, 967 F.2d 462, 465 (11th Cir. 1992).

IV. DISCUSSION

A. The State Procedural Bar

The first issue is whether the Batson claim is procedurally barred from federal review. A federal court may not reach a federal question on collateral review of a state conviction if the state court's opinion "contains a 'plain statement' that [its] decision rests upon adequate and independent state grounds." Harris v. Reed, 489 U.S. 255, 261, 109 S.Ct. 1038, 1042, (1989)(quoting Michigan v. Long, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3477 (1983)) (alteration in original). A state procedural bar constitutes an adequate and

independent state ground, thereby precluding federal habeas review, only if the last state court rendering a judgment on the procedural default. Id. at 261-63, 103 S.Ct. at 1042-43. In this case, the district court held that the Court of Criminal Appeals of Alabama did not clearly and expressly rely on the state procedural bar because the state court addressed the merits of the underlying federal claim in deciding the procedural state law question. (R.1-22 at 11-12.) Therefore, the district court held that it was not barred from addressing the Batson claim on collateral review. (Id. at 13.) Although we affirm the judgment of the district court, we base our affirmance on other grounds, and therefore offer no opinion regarding whether the Court of Criminal Appeals clearly and expressly relied on the state procedural bar.

In order for a state procedural bar to foreclose a federal court from reviewing a

federal claim in a §2254 proceeding, not only must the last state court rendering a judgment in the case comply with the "plain statement" rule, but also the procedural bar must be firmly established and a regularly followed state practice. Ford v. Georgia, 498 U.S. 411, 423-24, 111 S.Ct. 850, 857 (1991). When a state's "procedural default rule has been only sporadically invoked, the procedural default no longer bars consideration of the issue in federal court." Messer v. Florida, 834 F.2d 890, 893 (11th Cir. 1987)(citation omitted).

The Court of Criminal Appeals held that Cochran's Batson claim was procedurally barred because he did not raise the claim on direct appeal. Cochran, 548 So.2d at 1068. The State procedural bar precludes federal review of the Batson claim only if the State has firmly established and regularly followed this specific procedural bar in cases such as Cochran's. To answer this

question, we therefore must look at whether Alabama courts have consistently barred Batson claims because they were not raised on direct appeal in similar cases.

Cases such as Cochran's are unusual because the Batson decision came down while the case was on direct review.[7] In

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[7]Although Cochran was tried in 1982, his judgment of conviction was not final until 1987, when the Supreme Court denied certiorari from his direct appeal. Cochran, 548 So.2d at 1065. Batson was decided in April 1986, before Cochran's judgment of conviction was final. Under Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987), Batson applies retroactively to Cochran's case.

Although Cochran did not initially make a Batson challenge to the selection of his jury, Cochran did challenge the selection of his jury at the end of the voir dire under the rule of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965). In cases such as Cochran's, where the trial took place pre-Batson, a properly made Swain claim made in a pre-trial motion is treated as a timely made Batson objection for the purpose of preserving the Batson issue for appeal. Ford v. Georgia, 498 U.S. 411, 418-25, 111 S.Ct. 850, 855-58 (1991). Cochran did not

(Footnote Continued)

such cases, the Alabama courts have not consistently applied a procedural bar to Batson claims asserted in state collateral petitions where the defendant had raised a Swain objection at trial. The case most factually similar to Cochran's is Floyd v. State, 571 So.2d 1221 (Ala.Crim.App. 1989). Floyd is a case in which Batson had been

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(Footnote Continued)
raise the Batson claim on direct appeal, even though his appeal was not final until 1987, approximately one year after Batson was decided. Cochran raised the Batson issue for the first time in an amendment to his state petition for post-conviction relief. The State contends that Cochran could have raised the Batson claim on direct appeal by submitting a supplemental brief to the Alabama appellate courts after Batson was decided. The Alabama Court of Criminal Appeals held that because Cochran could have raised the Batson issue on direct appeal but did not, he was procedurally barred from raising it in a state collateral proceeding. Cochran, 548 So.2d at 1068. Because the Batson claim could have been raised on direct appeal but was not, the State argues, the claim is procedurally barred under state law, and therefore the district court was precluded from addressing the Batson claim in the §2254 proceeding.

decided following the denial of Floyd's application for a rehearing on direct appeal and while Floyd's petition for certiorari was pending in the United States Supreme Court. The Alabama Court of Criminal Appeals held that Floyd's Batson claim was procedurally barred because he had not raised the claim on direct appeal. Id. at 1223. The Alabama Supreme Court reversed, holding that Floyd should be allowed to raise a Batson claim in a Rule 20 proceeding, even though he had not raised the Batson claim on direct appeal, noting that Floyd had raised a Swain objection at trial. Ex parte Floyd, 571 So.2d 1234, 1235-36 (Ala. 1990).

In contrast, State v. Tarver, 629 So.2d 14, 18-19 (Ala.Crim.App. 1993), the Court of Criminal Appeals held that Tarver was procedurally barred from raising a Batson claim in a post-conviction hearing when Batson was decided while the case was on

direct appeal. The court distinguished Floyd because Tarver had not preserved the claim for appellate review by raising a Swain objection at the trial level. This case is factually more similar to Floyd than Tarver because Cochran, of course, did raise a Swain objection at trial. See also Watkins v. State, 632 So.2d 555, 562-63 (Ala.Crim.App. 1992)(noting that the Alabama Supreme Court has often remanded cases for a Batson hearing despite various procedural defaults), cert. quashed, 632 So.2d 566 (Ala.), cert. denied, ___ U.S. ___, 114 S.Ct. 2153 (1994).

The procedural posture of Cochran's case is unusual. Its characteristics are as follows: The case was tried pre-Batson, but the Batson issue was preserved because Cochran asserted a Swain objection; Cochran did not challenge the selection of the jury while the case was on direct review; Batson was decided after Cochran's conviction was

affirmed, but while his sentence was still being reviewed by the Court of Criminal Appeals; and the Batson claim was asserted for the first time in a state post-conviction proceeding. As Floyd and Tarver suggest, Alabama courts have not consistently applied a procedural bar to Batson claims in cases like Cochran's. Because the procedural bar has not been consistently applied in such cases, we hold that the procedural bar does not constitute an adequate and independent state ground which bars federal review. Therefore, the district court properly addressed the merits of Cochran's Batson claim.

B. The Batson Claim

The State contends that the district court erred in granting relief because the claim lacks merit. The State argues that the statistical evidence Cochran presented does not establish a prima facie Batson violation, and therefore the district

court's finding that a Batson violation occurred is clearly erroneous. Cochran contends that the district court correctly granted him relief because the evidence, both statistical and testimonial, clearly supports the district court's finding that a Batson violation occurred.

The district court held an evidentiary hearing on the Batson issue. At the evidentiary hearing, Cochran presented evidence showing that the prosecution used seven of its fourteen peremptory challenges to strike seven of the nine blacks on the forty-two person jury venire.[8] At the

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[8]This was Cochran's third trial for Ganey's murder. The first trial ended in a mistrial. The second trial resulted in a conviction, but was later reversed and remanded for a new trial. (R. 1-30 at 2 nn. 2-3.) At Cochran's previous two trials, the prosecution used a total of twenty-four of twenty-six peremptory challenges to strike blacks. This does not account for all of

(Footnote Continued)

evidentiary hearing, the State offered no race-neutral reason for these strikes. We need not decide whether the statistical evidence alone establishes a prima facie Batson violation, because there is additional evidence supporting the district court's finding.

Cochran presented evidence that the district attorney's office which prosecuted his case had an informal practice of using peremptory challenges to strike black jurors based, at least in part, on their race. A former prosecutor who worked for the district attorney's office around the time

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(Footnote Continued)
the prosecution's peremptory strikes. A few of the strikes could not be reconstructed at the evidentiary hearing. The court held that the evidence from Cochran's two previous trials was relevant circumstantial evidence in determining what happened at the 1982 trial because the same prosecutor served at all three of Cochran's trials. (Id. at 2.)

of Cochran's trials testified that the philosophy of the office "was that prospective black jurors at that time were anti-police, anti-establishment and should not be left on juries, if at all possible." (R.5 at 16.) He testified that there was a pattern in that office of striking blacks from juries, and that as a prosecutor, he struck black jurors because they were black. (Id. at 16-17, 25.) Another former prosecutor for the district attorney's office who served at the time of Cochran's trials testified that "race was a factor as particularly where you had a white victim and a black defendant ... [and] you had police involvement in the case," and that "most of the people in the office were aware of [this], and acted accordingly." (Id. at 44.) This former prosecutor indicated

that black jurors were struck because they were black.[9]

The prosecutor in Cochran's case[10] testified that at the time of Cochran's trial he believed that black jurors were less reliable for law enforcement than were white jurors, that they were more distrustful of police than were white jurors, that they would be less likely to return a death penalty verdict than would white jurors, and that they would be more

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[9]This prosecutor testified that the official policy of the District Attorney's office was that they were not to strike jurors solely on the basis of race, but the District Attorney allowed the deputy district attorneys to select juries in whatever way they felt comfortable. (R.5 at 48.) The prosecutor indicated that in practice, the prosecutors used race as a factor in selecting the juries and struck black jurors because they were black. (Id. at 44-45.)

[10]The same individual served as prosecutor at all three of Cochran's trials.

likely to identify with a black defendant than would white jurors. (Id. at 33-34.) The prosecutor offered no specific reasons for striking any of the seven blacks on the venire in Cochran's 1982 trial. (Id. at 38.)

Based on this evidence, the district court found that "there was in the District Attorney's office an informal practice of using peremptory challenges to strike black jurors at least in part on the basis of their race." (R.1-30 at 2.) The court further found that "at the time of Cochran's 1982 trial, race was at least one of several determining factors typically considered in the prosecution's decision to exercise peremptory challenges." (Id.) Thus, the Court found that "in [Cochran's] 1982 trial race was a determining factor in the prosecution's exercise of its peremptory challenges." (Id.) Noting that the State failed to give race-neutral reasons for striking black jurors, the court found that

Batson was violated. The court granted Cochran's habeas petition based on his Batson claim. (Id. at 2-3.)

Under a typical Batson analysis, the defendant must establish a prima facie case of racial discrimination. Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The trial court then determines whether the defendant has established purposeful discrimination. Batson, 476 U.S. at 96-98, 106 S.Ct. at 1723-24.[11] Because the State has

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[11]The district court applied a slightly different legal framework in this case. It should be noted that the legal framework applied in this case has not been challenged. The State has only challenged the district court's factual findings. The court's opinion granting Cochran relief on the Batson claim does not recite the law governing the case. (See R.1-30.) However,

(Footnote Continued)

failed to articulate a race-neutral reason

(Footnote Continued)
the court's original opinion, issued before the court granted the motion for reconsideration of the Batson issue, outlines the legal framework which the court applied in this case. (R.1-22 at 13.)

In the district court's first opinion on the Batson issue, the court noted that analyzing the merits of the Batson issue is particularly difficult in this case because Batson affects Cochran's case retroactively. The district court stated that ordinarily the trial court reviews a Batson claim by determining first whether the defendant has established a prima facie showing of discriminatory strikes by the prosecutor. If a prima facie case is established, the burden shifts to the prosecution to come forward with a neutral explanation for challenging black jurors. A reviewing court normally determines whether the trial court erred by failing to require the prosecutor to articulate a race-neutral reason for striking the jurors or by accepting the proffered reasons as rebutting the prima facie case. (Id.)

However, the district court stated that this case requires a different type of review because neither the trial court nor the parties anticipated the announcement of the Batson decision. Because of this, Cochran did not object to the prosecution's actual peremptory challenges at trial, and the prosecution was not afforded the opportunity to explain its challenges. In this case, the Batson claim is being

(Footnote Continued)

for challenging any of the black jurors, the only required analysis here is to determine whether Cochran has established purposeful discrimination. The State contends that under the statistical evidence of this case, the district court clearly erred in finding a prima facie case of discrimination. The State argues that under factually similar circumstances, this court has held the defendant had not established a prima facie Batson claim. Specifically, the State compares the facts in this case to United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973, and cert. denied, 481 U.S. 1037,

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(Footnote Continued)
reviewed for the first time in district court on collateral appeal. Because the prosecution offers no post-hoc explanation for striking black jurors, the court held that the success of Cochran's Batson claim hinged on whether Cochran could establish a prima facie case of purposeful discrimination. (Id.)

107 S.Ct. 1973, and cert. denied, 481 U.S. 1037, 107 S.Ct. 1973, and cert. denied, 481 U.S. 1974 (1987), and United States v. Allison, 908 F.2d 1531 (11th Cir. 1990), cert. denied, 500 U.S. 904, 111 S.Ct. 1681 (1991).

In Dennis, the Government used three out of four peremptory challenges to exclude blacks from the jury and from being alternates. However, the Government did not use all of its peremptory challenges, accepting a jury that contained two blacks. Thus, the Government did not attempt to exclude all blacks from the jury. This court concluded, under all the relevant facts and circumstances of that case, that an inference of purposeful racial discrimination was not raised. Dennis, 804 F.2d at 1210-11.

In Allison, the Government used three out of six peremptory challenges to strike black jurors. However, the court found that the

"unchallenged presence of three blacks on the jury undercuts any inference of impermissible discrimination that might arise simply by the striking of other blacks." Allison, 908 F.2d at 1537.

In this case, the State contends that although the prosecutor used seven of fourteen peremptory challenges to strike seven of the nine blacks on the venire, the jury contained two black members, one of whom was an alternate. Because the prosecutor could have struck all of the blacks from the jury but did not, the State argues that under Allison and Dennis, the unchallenged presence of blacks on the jury undercuts any inference of impermissible discrimination. The State also argues that the statistical evidence presented does not establish a prima facie case, because the venire was twenty-one percent black (nine out of forty-two) and the jury was fourteen percent black (two out of fourteen).

"In deciding whether the defendant has made the requisite showing, the ... court should consider all relevant circumstances." Batson, 476 U.S. at 96-97, 106 S.Ct. at 1723. "Although statistics showing discriminatory impact may in themselves constitute a showing of intentional discrimination, a statistical showing is not the sole means for establishing a prima facie case of discrimination." United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986) (citation omitted). "'[T]he totality of the relevant facts [may give] rise to an inference of discriminatory purpose.'" Id. (quoting Batson, 476 U.S. at 94, 106 S.Ct. at 1721.) Therefore, contrary to the State's contention, the statistical evidence is merely one factor which the court examines, and it is not necessarily dispositive.

Moreover, although the seating of blacks on the jury is a significant fact, it does not bar a finding of racial discrimination. Allison, 908 F.2d at 1537. "[U]nder Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." David, 803 F.2d at 1571.

In this case, the district court based its decision not only on the statistical evidence in the strike sheets, but also on the testimony of the prosecutor in the case and other members of the district attorney's office. The evidence supports the conclusion that a disproportionate number of blacks were struck from the jury in this case, as well as in Cochran's previous trials. The evidence also supports the conclusion that at the time of Cochran's trial, members of the district attorney's

office followed an informal policy of striking black jurors because of their race. Finally, the testimony of the individual who prosecuted Cochran supports the district court's conclusion that race was a determining factor in the exercise of peremptory challenges at Cochran's trial. Notwithstanding the fact that two of the fourteen jurors at the trial were black, the sum of the evidence supports the district court's conclusion that race was a determining factor in the prosecution's exercise of its peremptory challenges at Cochran's 1982 trial. Thus, the district court did not clearly err in concluding that the prosecution impermissibly discriminated against blacks in the selection of the jury at Cochran's trial.

V. CONCLUSION

We find that the district court was not precluded from addressing Cochran's Batson claim in a federal habeas proceeding because

Alabama has not consistently applied a procedural bar to Batson claims in cases like Cochran's. Moreover, we find that the district court did not clearly err in finding that the prosecution in this case impermissibly discriminated against blacks in using its peremptory strikes in violation of Batson.[12]

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[12]This case was well briefed and well argued by counsel for both parties. The court wishes to express its appreciation.

DOCUMENT NUMBER 6

JAMES WILLIE COCHRAN,

Petitioner-Appellee,
Cross-Appellant,

v.

TOMMY HERRING, Commissioner,
Alabama Department of Corrections,

Respondent-Appellant,
Cross-Appellee.

No. 93-7028

United States Court of Appeals,
Eleventh Circuit

July 26, 1995.

Appeals from the United States District Court for the Northern District of Alabama (No. 90-P-1247-S); Sam C. Pointer, Jr., Judge.

ON PETITION FOR REHEARING

Before TJOFLAT, Chief Judge, ANDERSON and COX, Circuit Judges.

PER CURIAM:

The panel opinion is reported at 43 F.3d 1404 (11th Cir. 1995). The panel modifies its opinion by deleting the following

citation from the end of the second full paragraph on page 1409:

> See also Watkins v. State, 632 So.2d 555, 562-63 (Ala.Crim.App. 1992) (noting that the Alabama Supreme Court has often remanded cases for a Batson hearing despite various procedural defaults), cert. quashed 632 So.2d 566 (Ala.), cert. denied, ___ U.S. ___, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).

The petition for rehearing filed by appellant/cross-appellee, Tommy Herring, is otherwise DENIED.

(3)

Supreme Court, U.S.
FILED
DEC 14 1995
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No. 95-761

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALABAMA,

Petitioner,

v.

JAMES WILLIE COCHRAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE J. FOX
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JURISDICTION

The Clerk of this Court originally rejected the Petition for Writ of Certiorari in this case because the Petition was neither timely received nor postmarked by the due date in accordance with this Court's Rule 29.2. The Attorney General attempted to cure this jurisdictional defect by filing the Affidavit of Brenda L. Bell, an employee of the United States Postal Service. The Affidavit is insufficient to cure the jurisdictional defect because the affiant does not state that the "package" addressed to this Court and placed in the United States mail on the due date contained the Petition for Writ of Certiorari relating to this case. The Petition for Writ of Certiorari should be denied for lack of jurisdiction.

INTRODUCTION

The courts below granted James Cochran habeas corpus relief based on overwhelming and undisputed evidence of racial discrimination in the prosecutor's use of peremptory strikes at Cochran's pre-*Batson* trial. This evidence included that prosecutor's own candid and striking testimony that he viewed black jurors as, among other things, "unreliable." Of the thirty-five black jurors known to have been available for service at Cochran's three pre-*Batson* trials, he struck thirty-one. Colleagues from that prosecutor's office testified below that exclusion of black citizens from jury service was a prevalent and accepted practice in Jefferson County, Alabama prior to *Batson*. It is unfortunate that the Attorney General

persists in seeking to preserve a conviction and death sentence so clearly marred by racial prejudice.

This is an important case because it involves a capital sentence, and because it demonstrates that *Batson* was a necessary change in the law. The case is not worthy of this Court's review, however, because the lower courts reached the correct result by application of settled principles of law concerning which this Court's prior decisions have provided clear and adequate guidance. Moreover, as discussed below, the "inconsistent application" rationale on which the Court of Appeals relied in reaching the merits of Cochran's *Batson* claim was but one of many avenues of analysis available to support the judgment. Finally, the unique facts and procedural history of this case – particularly as they relate to the *Batson* claim – make it highly unlikely that the decision below will affect an appreciable number of other cases or litigants.

The sole Question Presented by Petitioner is whether the Court of Appeals erred in concluding that the *Batson* claim "could be reviewed on the merits in Cochran's federal habeas corpus proceeding because the state courts did not consistently apply its procedural bar." The Attorney General contends that the decision below conflicts with this Court's decision in *Dugger v. Adams*, 489 U.S. 401 (1989), and also with the Court of Appeals' prior decisions. As discussed below, however, there is neither tension nor conflict amongst these decisions, and review by this Court is not warranted. We begin by clarifying the procedural history as it relates to the *Batson* claim.

STATEMENT OF THE CASE

From the very beginning of the state proceedings, Cochran's lawyers challenged the State's racially biased use of peremptory challenges. In a written motion filed on February 28, 1977, before Cochran's first trial, Cochran requested that "the District Attorney and his staff be restricted from using their peremptory strikes in a racially biased manner or, in the alternative, that the District Attorney and his staff not be allowed to use the peremptory strikes." R1-3-Tab R-38, at 27. In the motion, Cochran's counsel argued that "[t]he District Attorney and his staff have over a long period of time excluded members of the black race from being allowed to serve on the jury where the issues to be tried involved members of the opposite race." *Id.* Despite the fact that the motion requested only that the prosecutor be restricted from using peremptory strikes in a racially biased manner, it was opposed by the prosecutor, and denied by the trial court. R1-3-Tab R-38, at 90.

The trial court's refusal to restrict the prosecution from racially biased use of peremptory strikes flowed presumably from a prevalent, albeit erroneous, view that racially motivated use of peremptory challenges was permissible under the then-governing law. R1-36, at 22, 45 (testimony of former assistant district attorneys); *Lynn v. State*, 477 So.2d 1365, 1376-77 (Ala. Crim. App. 1985) ("Alabama courts have consistently held that it is not error for the prosecuting attorney to strike a jury on the basis of race."); *but see Ford v. Georgia*, 498 U.S. 411, 420 (1991) (explaining that both *Batson* and *Swain* prohibited racially biased use of peremptory strikes, and that *Batson*

simply altered the quantum of proof necessary to establish a particular claim). Unfettered by the trial court, the prosecutor exercised 24 of 26 strikes in Cochran's first two trials to exclude black members of the venire.

Cochran's counsel reasserted the motion to restrict racially biased striking of jurors at the trial in 1982. Again, the trial court denied the motion. R1-3-Tab R-9, at 539. On direct appeal from the 1982 conviction, and before *Batson* was decided, the Alabama Supreme Court affirmed Cochran's conviction, but remanded for resentencing. *Ex Parte Cochran*, 500 So.2d 1179, 1187 (Ala. 1985). On remand, the trial court resentenced Cochran to death without an evidentiary hearing.

Batson was decided on April 30, 1986, eight days *after* Cochran's counsel filed their brief attacking the resentencing order in the Alabama Court of Criminal Appeals. At that time, Cochran's case was on submission in the Court of Criminal Appeals at a stage in the direct appellate proceedings in which the sole focus was on issues concerning the resentencing proceedings that were the subject of the Alabama Supreme Court's remand. *Cochran v. State*, 500 So.2d 1064 (Ala. 1986) ("The only issue before us is whether the trial court erred in not holding a new sentencing hearing."). Alabama appellate courts have refused to consider "guilt phase" claims when asserted on appeal from a remand proceeding involving only resentencing. *See Giles v. State*, 632 So.2d 568, 576 (Ala. Crim. App. 1992) (citing *Magwood v. State*, 548 So.2d 512, 515 (Ala. Crim. App. 1988)). Cochran's direct appellate counsel testified below that, given the unique procedural posture of the case at the time *Batson* was decided, they knew of no method by which they could place the claim

before the Alabama Supreme Court. R1-20-Volume I, at 36, 212-13. In any event, given the posture of the appeal, the Alabama Supreme Court reviewed *only* the propriety of the trial court's refusal to hold a new sentencing hearing on remand.

Cochran raised the *Batson* issue by written amendment to his Petition for Post-Conviction Relief under Temporary Rule 20. R1-3-Tab R-64. The Attorney General quotes at length from a colloquy that occurred at the post-conviction hearing in which the state trial court expressed the conclusion that the *Batson* claim was procedurally defaulted. *Respondent's (sic) Petition for Writ of Certiorari*, at 10-11 (citing R1-3-Tab R-60, at 22-23) (the *"Certiorari Petition"*). Although conceding that the state trial court ultimately ruled on the merits of the *Batson* claim "in the alternative," the Attorney General nevertheless relies on this colloquy to support the State's argument that the state trial court defaulted the claim.

But the post-conviction hearing transcript does not tell the whole story. In fact, after the post-conviction hearing, the state trial judge contacted Cochran's counsel by telephone, expressing "concern" over the summary disposition of the *Batson* issue, and requested copies of counsels' strike sheets from the 1982 trial. R1-20-Volume I, at 40. Having apparently reviewed this limited evidence, the state trial judge began his discussion of the *Batson* issue in his written opinion with a cryptic disavowal of the very colloquy on which the Attorney General now relies:

> Now to the Batson issue. 'The matter does not appear to me now as it appears to have

> appeared to me then.' From 'Judicature' February-March, 1988 publication.
>
> At the outset of this hearing this Court did not wish to hear the *Batson* motion stating the Court's consideration was precluded. The more this Court thought about this issue, the more consideration of the issue was required.

R1-3-Tab R-61, at 5. The trial court then reviewed the merits and concluded:

> This Court finds that there is no ground nor evidence to justify further hearing on this issue. This Court finds that there was no violation of the *Batson* opinion. This Court finds there was no discriminatory striking of blacks within the criteria outlined by the *Batson* decision . . . .

Id. at 7. The Court of Criminal Appeals affirmed the trial court's rejection of the *Batson* claim on the merits, similarly concluding that "there is nothing in the record to indicate or imply that the State engaged in racial discrimination in the selection of the jury . . . ." *Cochran*, 548 So.2d 1062, 1069 (Ala. Crim. App. 1989).

We raised the *Batson* claim again in the habeas corpus proceedings below. The District Court initially denied discovery on the claim on the ground that the claim was procedurally barred from review, but later concluded that the claim was reviewable because the state courts had decided the claim on the merits. *Appendix to Petition for Writ of Certiorari*, at 27-30. Although the Court of Appeals opted to dispose of the procedural default issue on the "inconsistent application" rationale, it is clear, as discussed below, that the District Court's reasoning provides

an equally compelling basis for affirmance of the judgment below.

The evidence presented to the District Court on the *Batson* claim was undisputed, clear and compelling. The prosecutor from Cochran's 1982 trial admitted that, at the time of Cochran's trial, he believed that black jurors, as a class, were: (i) less "reliable" jurors for law enforcement than white jurors; (ii) more likely to be "distrustful of police" than white jurors; (iii) less likely to recommend the death penalty than white jurors; and (iv) more likely to "identify with" a black defendant than white jurors. R1-36-Volume V, at 33-34. The prosecutor offered no race-neutral explanation for having used seven of his first ten peremptory strikes to exclude all but two of the nine black members of the trial venire. In fact, the prosecutor could not deny that his beliefs about black jurors influenced his selection of Cochran's jury. *Id.* at 38.

Also, two former assistant district attorneys employed by the Jefferson County District Attorney's office during the relevant time period testified that exclusion of black jurors from service was a prevalent and accepted practice in the office at the time of Cochran's trial, particularly in cases involving a black defendant and a white victim. *Id.* at 16, 44. This practice infected Cochran's trial in 1982, just as it had his first two trials, in 1977 and 1978. The Attorney General stipulated in the court below that the prosecutor used 11 of 12 strikes in the 1977 trial and 13 of 14 strikes in the 1978 trial to exclude black jurors from service. *Id.* at 3-11. This general pattern continued at Cochran's 1982 trial.

Again by stipulation, the Attorney General conceded below that: (i) the prosecutor struck black jurors who had given the same answers in voir dire as white jurors whom the prosecutor did not strike; (ii) the prosecutor struck black jurors who provided only responses favorable for the prosecution in voir dire, *i.e.*, that they had been victims of a crime; and (iii) the prosecutor struck one black juror despite the fact that the juror did not respond to any questions during voir dire. R1-36-Volume V, at 3-4; *Petitioner's Motion for Reconsideration and Request to Alter or Amend Judgment and Findings*, at 15-18 (citing state record as to each fact) (the "Reconsideration Motion").[1]

The one black juror who participated in deliberations at Cochran's trial testified in voir dire that: (i) he was personally acquainted with the District Attorney and had played golf with him; (ii) he had served on a jury previously and voted to convict the defendant; (iii) he had been the victim of a crime; and (iv) his son, like the victim, had worked in a grocery store. The prosecutor testified in the District Court that these factors rendered this particular black juror "very satisfactory" to the government. R1-36-Volume V, at 41.

On the basis of this evidence, the District Court granted the writ.

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[1] The Attorney General stipulated in the District Court to the facts set forth in the Reconsideration Motion. R1-36-Volume V, at 3. A copy of the Reconsideration Motion was included at Tab 1 in Appellee's Record Excerpts filed in the Court of Appeals.

SUMMARY OF THE ARGUMENT

In the years following this Court's decision in *Batson*, the courts of Alabama repeatedly excused both trial and direct appellate defaults in order to remedy *Batson* violations that occurred in pre-*Batson* trials. The Attorney General's contention that this case involves a procedural default rule that was applied by the state courts in two out of only three cases is thus misleading and incorrect. We cite below nine examples of cases in which defaults were excused, and there are surely more. This is not an appropriate case, therefore, in which to examine the limits of this Court's suggestion in *Dugger v. Adams*, 489 U.S. 401, 410 (1989) that the "adequacy" of a procedural default rule enforced in the "vast majority of cases" might not be undermined by deviations in, as the Attorney General puts it, a "few cases."

Even if this Court were to accept the Attorney General's myopic focus on the three state court decisions he chooses for comparison, there is still no conflict between the Court of Appeals' decision in this case and *Adams*. *Adams* simply does not stand for the proposition that a default rule applied in a "majority" of cases must be enforced by a federal court. Moreover, as demonstrated below, the Attorney General flatly misstates the holding in one of the three chosen cases – *Morrison v. State* – to support his contention that the procedural default rule at issue has been consistently applied to cases "like Cochran's."

In any event, the sole Question Presented here would in all likelihood not be reached by this Court on review, because the record of the state proceedings demonstrates

that the Alabama state courts resolved the *Batson* claim on the merits, as the District Court held. There is thus no reason in this case to address the consistency, or lack thereof, with which Alabama courts have applied procedural default rules to *Batson* claims.

Finally, the unique procedural history of this case, particularly as it relates to the timing of the *Batson* decision, makes it highly unlikely that the decision below will affect many other litigants. *Batson* has been the law now for almost a decade, and the struggle to remedy *Batson* error from pre-*Batson* trials is nearing an end. In this case, the lower courts were able to remedy a clear *Batson* violation by application of settled principles of habeas corpus jurisprudence.

REASONS FOR DENYING THE WRIT

The doctrine of procedural default in habeas corpus jurisprudence is rooted in the "independent and adequate state law ground" doctrine first enunciated by this Court in defining its certiorari jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The principle, put simply, is that a federal court in a habeas corpus proceeding will not disturb a dispositive ruling by a state court rejecting a federal constitutional claim where the state court's judgment rests on state law grounds that are both "adequate" to support the judgment and "independent" of any interpretation of federal law. *Id.* In the habeas corpus context, the rule is grounded on concerns for comity and federalism. *Id.* at 730-31. Application of the rule ensures state courts an opportunity to address federal constitutional

state courts an opportunity to address federal constitutional claims in the first instance, and reflects respect for the states' interest in enforcing local procedural rules in the conduct of criminal proceedings.

A. The Court of Appeals' "Inconsistent Application" Rationale Is Sound, And Does Not Conflict With This Court's Precedents.

To be "adequate" to foreclose federal review, the procedural default upon which the state judgment is premised must be one that is strictly and regularly applied. *Ford*, 498 U.S. at 423-24; *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988); *James v. Kentucky*, 466 U.S. 341, 348-51 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263-65 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Messer v. Florida*, 834 F.2d 890, 893 (11th Cir. 1987); *Spencer v. Kemp*, 781 F.2d 1458, 1470-71 (11th Cir. 1986); *Francois v. Wainwright*, 741 F.2d 1275, 1281 (11th Cir. 1984). There is more than ample support for the Court of Appeals' conclusion that trial and direct appellate procedural default rules have not been strictly or consistently applied to *Batson* violations in the Alabama courts, particularly those *Batson* claims arising from capital trials conducted before *Batson* was decided. *See, e.g., Watkins v. State*, 632 So.2d 555 (Ala. Crim. App. 1992) (collecting cases).

Indeed, in the aftermath of *Batson*, the courts of Alabama routinely disregarded procedural obstacles to correcting *Batson* error that occurred at pre-*Batson* trials. *See, e.g., Ex parte Floyd*, 571 So.2d 1234, 1236 (Ala. 1990) (in context of state post-conviction proceeding, Alabama

Supreme Court remands to trial court for *Batson* hearing despite procedural default on direct appeal); *Lynn v. State*, 543 So.2d 704, 706 (Ala. Crim. App. 1987) (Alabama Court of Criminal Appeals remands for *Batson* hearing on recommendation of Attorney General); *Hemphill v. State*, 571 So.2d 365, 367 (Ala. Crim. App. 1990) (in non-capital case, Court of Criminal Appeals remands for *Batson* hearing without discussing procedural default); *Ex parte Bankhead*, 585 So.2d 112, 117 (Ala. 1991) (On Application for Rehearing) (on direct appeal, Alabama Supreme Court remands for *Batson* hearing under plain error rule where no objection was raised at trial); *Walker v. State*, No. 7 Div. 164, slip op. at 3 (Ala. Crim. App. July 26, 1991) (remand for *Batson* hearing under plain error rule where *Batson* issue raised for first time on direct appeal).

Given the prevalent misconception in the Alabama courts prior to *Batson* that race-based use of peremptory challenges was constitutional, the Alabama courts were particularly aggressive in the years following *Batson* in reaching out to protect the rights of capital defendants where *Batson* error appeared in the record of a pre-*Batson* trial. *See, e.g., Bankhead*, 585 So.2d at 117 (on application for rehearing, Court remands for *Batson* hearing); *Ex parte Adkins*, 600 So.2d 1067, 1068-69 (Ala. 1992) (remand for *Batson* hearing); *Ex parte Godbolt*, 546 So.2d 991, 998-99 (Ala. 1987) (remand for *Batson* hearing "[a]lthough the matter was not called to our attention by counsel"); *Guthrie v. State*, No. 7 Div. 287, slip op. at 2 (Ala. Crim. App. June 12, 1992) (remand for *Batson* hearing where "appellant neither raised this issue in the trial court nor argued it on appeal"); *Walton v. State*, 523 So.2d 134 (Ala. Crim. App.), *cert. denied*, No. 86-829 (Ala. 1987) (remand for

Batson hearing on application for rehearing). The courts of Alabama spoke clearly during these years, by aggressive, indeed extraordinary application of the "plain error" rule and, where necessary, by simple disregard of procedural default rules altogether. *See, e.g., Floyd*, 572 So.2d at 1236. Given that the courts of Alabama opted repeatedly to excuse procedural defaults in order to remedy *Batson* violations from pre-*Batson* trials, it cannot fairly be said that the courts below showed any disrespect to the courts of Alabama by proceeding to the merits of Cochran's *Batson* claim.

In its opinion, the Court of Appeals focused primarily on *Floyd* and *State v. Tarver*, 629 So.2d 14, 18-19 (Ala. Crim. App. 1993). In *Tarver*, the Alabama Courts of Criminal Appeals ruled that a *Batson* claim raised for the first time at the post-conviction phase had been procedurally defaulted on direct appeal. The *Tarver* Court distinguished *Floyd* on the ground that no *Swain* objection had been raised at Tarver's trial. *Tarver*, 629 So.2d at 19. The Court of Appeals noted in its analysis below that this case is like *Floyd*, and not like *Tarver*, because Cochran's counsel made a *Swain* objection at his trial.

The Attorney General argues here, as he did on application for rehearing below, that a third case, *Morrison v. State*, 551 So.2d 435 (Ala. Crim. App. 1989), shares the procedural characteristics of both *Cochran* and *Floyd*, in that *Morrison* involved a pre-*Batson* trial at which a *Swain* objection was raised. Given that the *Morrison* court rejected the *Batson* claim on procedural default grounds in the state post-conviction proceedings, the Attorney General posits that the courts of Alabama have indeed applied its procedural default rules "consistently" – at

least in two out of three cases in which a *Swain* objection was made at trial prior to a direct appellate default of a *Batson* claim. This argument does not warrant this Court's consideration for several reasons.

First, the "two out of three" argument is grounded in the false premise that a procedural default rule can be "adequate" despite widespread inconsistent application so long as the rule is applied marginally consistently to an isolated triad of cases sharing similar procedural histories. As discussed above, the cases are legion in which the Alabama courts excused both trial and direct appellate defaults to address *Batson* error arising from pre-*Batson* trials. There is simply no support, and the Attorney General points to none, for the proposition that "relevant" cases for purposes of analyzing consistency of application are limited to those sharing like procedural histories.

The second flaw in the "two out of three" rationale is that it proceeds from the premise that the Alabama courts defaulted the *Batson* claim in the *Morrison* case despite knowing that a *Swain* objection had been raised at Morrison's trial. The Attorney General fails to point out, however, that the Alabama Court of Criminal Appeals was apparently unaware that a *Swain* objection had been raised at Morrison's trial. *Morrison*, 551 So.2d at 437 ("There was no objection to [the prosecutor's use of peremptory strikes] *at trial* or on direct appeal." (emphasis added)). Thus, the decision in *Morrison* lends no support to the Attorney General's contention that the Alabama courts have been consistent in rejecting *Batson* claims in cases he deems "like Cochran's."

Even if this case were as the Attorney General presents it, there would be no conflict with *Adams*, or with the Court of Appeals' prior decision in *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989). This Court did not hold in *Adams* that the failure to enforce a procedural default rule in a "few cases" should be disregarded, or that a rule enforced in the "vast majority of cases" is "adequate" *per se*. Neither did the Court of Appeals so hold in *Delap*. In fact, in neither case did the majority acknowledge *any* deviation by the state courts in application of the relevant procedural default rule. *Adams*, 489 U.S. at 410 n.6; *Delap*, 890 F.2d. at 300. Instead, in both cases the majority concluded that the alleged examples of "deviation" by the state courts were either unclear or misinterpreted by the habeas corpus petitioner. *Id.* Neither *Adams* nor *Delap*, then, can fairly be read as establishing that state procedural rules applied in a "majority" of cases are "adequate" to bar federal review.

In fact, this Court has suggested that a single deviation from enforcement of a procedural rule undermines "adequacy," if the deviation occured under circumstances similar to that presented in the case under review. *Hathorn*, 457 U.S. at 264 ("[t]he striking similarity between *Quinn* [in which the procedural default rule was not enforced] and this case . . . persuades us that the Mississippi Supreme Court is not 'strictly or regularly' following [the relevant procedural rule] . . . ."); *see also Wheat v. Thigpen*, 793 F.2d 621, 626 (5th Cir. 1986) (finding inconsistent application on the basis of a single state court decision); *Wilcher v. Hargett*, 978 F.2d 872 (5th Cir. 1992) (same). Thus, the weight of authority, including this

Court's prior decisions, supports the Court of Appeals' rationale. There is thus no conflict in the decisional law.

B. The District Court's "Clear and Plain Statement" Rationale Provides An Independent Basis For Affirmance Of The Court Of Appeals' Decision.

State court decisions often contain mixed discussions of federal (substantive) and state (procedural) grounds for decision, as in this case. In such cases, this Court has developed and applied a conclusive presumption – referred to as the "clear and plain statement" rule – to determine whether the state procedural ground for decision should foreclose federal review of a constitutional claim. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (articulating the rule in the context of certiorari jurisdiction); *Harris v. Reed*, 489 U.S. 255, 263 (1989) (extending the rule to habeas corpus proceedings). The rule provides that federal courts will presume that there is no independent and adequate state ground for a decision where the decision "fairly appears to rest primarily on federal law or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 735 (quoting *Long*, 463 U.S. at 1040-41).[2]

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[2] In *Coleman*, this Court made clear that the *Harris* presumption "applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." *Id.* at 739. *Coleman* thus

The Alabama Court of Criminal Appeals' decision here presents a classic case for application of the *Harris* presumption, as the District Court held. The court's extensive discussion of the factual merit of Cochran's *Batson* claim, and its conclusion that there was "nothing in the record to indicate or imply that the State engaged in racial discrimination in the selection of the jury" plainly demonstrate that the decision rested primarily on federal law. Moreover, the discussion of procedural default contained in the opinion is itself "interwoven with federal law." The court stated plainly that application of the alleged procedural default depended on the court's view that the claim lacked merit. *Cochran*, 548 So.2d at 1068 ("Although Cochran has been sentenced to death, the alleged error in this case is not 'plain' as we have indicated above.").

The Attorney General argues here, as he did below, that the following text, carefully excised from the State court's extensive discussion of the merits, constitutes a "clear and plain statement" within the meaning of *Harris:*

> Under the circumstances present, Cochran is procedurally barred from relief on his claim that the State actually used its peremptory challenges in a racially discriminatory manner in violation of *Batson, supra*. As we have observed, that issue could have been raised on direct appeal. A petitioner will not be given relief

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made clear that there is no requirement of a "clear and plain statement" in cases involving state court summary affirmances or dismissals that contain no federal law component, and that clearly rest on a state procedural ground. *Id.* at 739-44; *see also Ylst v. Nunnemaker*, 501 U.S. 797 (1991).

> under . . . [Rule 20] based upon any ground which could have been but was not raised on appeal.

Id. at 1067-68 (citations omitted). The Attorney General argued below that the quoted text clearly and plainly demonstrates that the Court of Criminal Appeals' extensive merits discussion was simply an "alternative" holding, which is permissible under the *Harris* test.

But the language the Attorney General cites does not constitute a "clear and plain statement" within the meaning of *Harris*. The text includes nothing to support the contention that the alleged procedural bar was "adequate" to support the judgment, or was "independent" of federal law. To the contrary, the procedural default paragraph is preceded by a detailed discussion of the merits of the claim, and the paragraph itself begins with the phrase "under the circumstances present," which ties the procedural default paragraph to the merits discussion. Moreover, the discussion that follows the Attorney General's favored paragraph reveals plainly that the alleged default would not have been sufficient itself to bar relief, had the *Batson* claim been found to have merit. The court's concluding paragraph demonstrates that its ruling was driven primarily by its view that the record contained nothing "to indicate or imply that the state engaged in racial discrimination in the selection of the jury." *Cochran*, 548 So.2d at 1069. This, we now know, was simply incorrect.

Where, as here, a state court's procedural default finding is interwoven with the merits of a federal constitutional claim, the "clear and plain statement" rule requires something more than the mere recitation that a

procedural default occurred. *Harris*, 489 U.S. at 264 n.10 (state courts are free to reach merits of federal claim as "alternative" holding "as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision."). In the words of the District Court, "it is impossible to determine whether a state ground for decision is adequate if the state court does not clearly indicate that it is *independently* relying on that ground." R1-31-12 (emphasis added). In *Coleman*, this Court articulated the principle succinctly:

> After *Long*, a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption *by stating 'clearly and expressly that [it's decision] is . . . based on bona fide separate, adequate and independent grounds.'*

Coleman, 501 U.S. at 733 (quoting *Long*, 463 U.S. at 1041) (emphasis added). Thus, it is "the *adequacy* and *independence* of any possible state law ground" that must be expressed "clearly" and "plainly" – not simply the fact of a default. *Id.* (quoting *Long*, 463 U.S. at 1040-41) (emphasis added).

The Court of Criminal Appeals reviewed the merits of Cochran's *Batson* claim under the "plain error" rule. Plain error review commonly occurs only on direct review, and the very purpose of the plain error rule is to identify those claims as to which otherwise applicable procedural defaults are to be excused. Thus, the very nature of the Court of Criminal Appeals' merits discussion reveals that the procedural default finding was

dependent on the court's merits ruling.[3] Whatever the Court of Criminal Appeals' intentions, it is clear from the opinion that the court would have granted relief, and thus excused any procedural default, had it found Cochran's *Batson* claim to have merit.

Where a state court reaches the merits of a claim under the "plain error" rule, federal review is not barred. *See Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982) ("If Ohio had exercised its discretion to consider respondents' claim [under the plain error rule], then their initial default would no longer block federal review."); *Hargrave v. Dugger*, 832 F.2d 1528, 1539 (11th Cir. 1987) (Tjoflat, J., specially concurring) (habeas corpus review not barred where state court elects to address merits of claim under "plain error" rule); *Rogers-Bey v. Lane*, 896 F.2d 279, 281 (7th Cir. 1990) (same); *Walker v. Endell*, 850 F.2d 470, 473-74 (9th Cir. 1987) (federal review permitted where claim was "reviewed by a state appellate court on the merits for plain error."); *Huffman v. Ricketts*, 750 F.2d 798, 800-01 (9th Cir. 1984) (federal review required where state

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[3] The court's willingness to engage in "plain error" review at the collateral stage flowed presumably from the fact that *Batson* had been decided at a point in the direct appellate stage at which the parties were precluded from raising issues other than those arising from the resentencing proceedings. *Giles*, 632 So.2d at 576. The Alabama appellate courts' "plain error" review on direct appeal occurred prior to this Court's decision in *Batson*, and Cochran had no real opportunity to raise the claim on direct appeal thereafter. This is yet another ground on which the Court of Appeals' judgment could be affirmed. *See Johnson*, 486 U.S. at 587-89 (procedural default rule not "adequate" where rule would require assertion of claim in forum where claim could not be heard).

court entertains merits of procedurally defaulted claim to determine whether claim constitutes "fundamental error"); *U.S. ex rel Gibson v. McGinnis*, 773 F. Supp. 126, 131-32 (C.D. Ill. 1991) ("A state court's examination of the merits of a federal claim – even if only to determine whether it would be fair to impose a state procedural bar – constitutes sufficient predicate to apply the *Harris* presumption.").

The Harris presumption is triggered "when the *adequacy* and *independence* of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 735 (quoting *Long*, 463 U.S. at 1040-41) (emphasis added). The Attorney General can point to no word or phrase in the opinion of the Court of Criminal Appeals to support his contention that the court's merits discussion was truly an "alternative" holding. The District Court thus correctly concluded that the *Batson* claim was subject to review, and this rationale provides an independent basis for affirmance of the judgment below.

CONCLUSION

Racial discrimination in the selection of jurors " 'casts doubt on the integrity of the judicial process . . . and places the fairness of the criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400 (1991) (citations omitted). "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection

because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

These words reflect this Court's unwavering commitment to the promise of *Batson*. James Cochran respectfully requests that this Court deny the Petition for Writ of Certiorari, so that he might enjoy the benefit of that promise.

Respectfully Submitted,

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